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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

OF

UPPER CANADA;

FROM MICHAELMAS TERM, 28 VIC., TO TRINITY TERM, 29 VIC.

BY

S. J. VANKOUGHNET, M.A.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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JUDGES

OF THE

COURT OF COMMON PLEAS.

The Hon. WILLIAM BUELL RICHARDS, C.J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

Attorney General:

HON. JOHN A. MACDONALD.

Solicitor General:

HON. JAMES COCKBURN.

A TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

A.	PAGE.	C.	PAGE
Armstrong, Twohy v.	269	Campbell v. Baxter	42
Articled Clerk, In the matter of		Carson, Frank v.	135
Malcolm Ogilvie McGregor, an.	54	Corporation of the City of Toronto,	
B.		Reynolds v.	276
Bagley qui tam. v. Curtis	366	Crawford v. Curragh et al.	55
Bain, The Great Western Railway		Crooks v. Dickson.....	23
Company v.	207	" " 	523
Baker, White et al. v.	292	" " 	528
Bank of Upper Canada v. Ocker-		Curragh et al., Crawford v.	55
man	363	Curtis, Bagley qui tam v.	366
Bank of Upper Canada, Vidal v.	421	D.	
Bank of Montreal v. Taylor	107	Date v. Gore District Mutual Insur-	
Baxter v. Baynes	237	ance Company	175
Baxter, Campbell v.	42	Dickson, Crooks v.	23
Baynes, Baxter v.	237	" " 	523
Berry, Stephens v.	548	" " 	528
Bettes, v. Farewell.....	450	Donovan, Soules v.	121
Bogart, The Corporation of Thur-		Duncan Patton, Henry J. Noad, and	
low v.	601	W. H. Jeffrey, The Northern	
Bogart, The Municipality of the		Railway Co. of Canada v.	332
Corporation of the Township of		F.	
Thurlow v.	9	Fall, Harrington v.	541
Bond v. Bond.....	613	Farewell, Bettes v.	450
Boulter v. Hamilton.....	125	Farewell v. Grand Trunk Railway	
Boyd et al., Moore v.	513	Company.....	427
Brown v. Gossage et al.	20	Featherston v. McDonell	162
Buchanan et al. v. Frank.....	196		

	PAGE.		PAGE.
Ferguson et al., Friel v	584	In the Matter of O'Neil and the Corporation of the United Coun- ties of York and Peel	249
Ferris, Gott v.....	295		
Finkle, The Queen v.....	453	K.	
Fluke, Young et al. v	360	Keleher, McNeil v	470
Fourdrinier v. Hartford Fire Insur- ance Company	403	Kerr et al. v. Kinsey.....	531
Fox, Nolan v	565	Keys, Wilson v	32
Frank, Buchanan et al. v.....	196	King v. Macdonald	397
Frank v. Carson.....	135	Kinsey, Kerr et al. v.....	531
Fraser, Russell v	375		
Friel v. Ferguson et al.....	584	L.	
		Leatherman et al. v. Trow	578
G.		Lowell v. Todd et al.....	306
Glennie v. Ross	536		
Godfrey et al., Hicks v.....	262	Mc.	
Gore District Mutual Insurance Company, Date v	175	Macdonald, King v	397
Gossage et al., Brown v	20	McCallum v. McKinnon	561
Gott v. Ferris	295	McDonell, Featherston v.....	162
Gottwalls v. Mulholland	62	McDougall, The Bank of Toronto v.	475
Grace, Thomas v	462	McGuire v. Shaw	310
Graham, Rayson v.....	36	McIlroy, The Queen v.....	116
Graham v. Stewart	169	McKinley et al., Munsie v	50
Grand Trunk Railway Company, Farewell v	427	McKinley v. Munsie	230
Grand Trunk Railway Company, Moffatt et al. v	392	McKinnon, McCallum v	561
Great Western Railway Company, Spettigue et al. v	315	McLaughlin v. McLaughlin	182
Greaves v. Hilliard	326	McNab v. Stewart.....	189
		McNeil v. Keleher.....	470
H.		McPherson, The Queen v	17
Hall v. Goslee et al'	101	McRory, Ogilvie v.....	557
Hamilton, Boulter v.....	125		
Harrington v. Fall.....	541	M.	
Hartford Fire Insurance Company, Fourdrinier v	403	Malcolm Ogilvie McGregor, an Ar- ticled Clerk, In the matter of..	54
Hatch et al., The Queen v	461	Matthewson et al. v. Henderson et al	90
Henderson et al., Matthewson et al. v	90	Miller v. The Beaver Mutual Fire Insurance Company	75
Hicks v. Godfrey et al.....	262	Miller et al. v. Grand Trunk Rail- way Company.....	392
Hilliard, Greaves v	326	Moore v. Boyd et al	523
Hueback et al., Robertson v	298	Moore et al., The Corporation of North Gwillimbury v	445
		Mulholland, Gottwalls v	62
I.		Munsie v. McKinley et al	50
Ingalls et al. v. Reid.....	490	Munsie, McKinley v.....	231
In the matter of Malcolm Ogilvie McGregor, an articled Clerk ..	54		

TABLE OF CASES.

vii

N.	PAGE.	PAGE.
Nolan v. Fox	565	Taylor, Bank of Montreal v 107
Nudell et al. v. Williams	348	The Beaver Mutual Fire Insurance Company, Miller v 75
O.		The Chief Superintendent of Edu- cation in re Hogg v. Rogers.... 417
Ockerman, Bank of Upper Canada v	363	The Corporation of North Gwillin- bury v. Moore et al 445
Ogilvie v. McRory.....	557	The Corporation of Thurlow v. Bogart 601
O'Neil and the Corporation of the United Counties of York and Peel, In the matter of	249	The Great Western Railway Com- pany v. Bain 207
Oulette, The Queen v	260	The Municipality of the Corpora- tion of the Township of Thur- low v. Bogart 9
P.		The Northern Railway Company of Canada v. Duncan Patton, Henry J. Noad, and Wm. H. Jeffrey 332
Parker, The Queen v	15	The Queen v. Finkle..... 453
Pearson v. Ruttan et al	79	The Queen v. Hatch et al 461
Perry, The Attorney General v	329	The Queen v. McIlroy..... 116
R.		The Queen v. McPherson 17
Rayson v. Graham	36	The Queen v. Ovellette..... 260
Reid, Ingalls et al. v.....	490	The Queen v. Parker 15
Reikie, Scott v	200	The United Counties of York and Peel, In the matter of O'Neil and the Corporation of..... 249
Reynolds v. The Corporation of the City of Toronto.....	276	Thomas v. Grace 462
Robertson v. Hueback et al.....	298	Thompson, Miller et al. v 186
Robinson, Selby v.....	370	Todd et al., Lowell v. 306
Robinson v. Shields.....	386	Trow, Leatherman et al. v 578
Rogers, The Chief Superintendent of Education in re Hogg v....	417	Turley v. Williamson (Tenant) John Johnston (Landlord)..... 538
Ross, Glennie v.....	536	Twohy v. Armstrong..... 269
Row, Wilkins v	325	V.
Russell v. Fraser	375	Vidal v. Bank of Upper Canada.... 421
Ruttan et al., Pearson v	79	W.
Rules of Court	623	Whalen, Sloan et al. v..... 329
S.		White et al. v. Baker..... 292
Scott v. Reikie	200	Williams, Nudell et al. v..... 348
Selby v. Robinson.....	370	Williamson (Tenant), John Johnston (Landlord), Turley v..... 538
Shaw, McGuire v	310	Wilson v. Keys 32
Shields, Robinson v.....	386	Wilson, Squire qui tam. v 284
Sloan et al. v. Whalen.....	319	Wilkins v. Row..... 325
Soules v. Donovan.....	121	Y.
Spettigue et al. v. Great Western Railway Co.....	315	Young et al. v. Fluke 360
Squire qui tam. v. Wilson	284	
Stephens v. Berry.....	548	
Stewart, Graham v	169	
Stewart, McNab v:	189	
T.		
The Attorney-General v. Perry	329	
The Bank of Toronto v. McDougall.	475	



REPORT OF CASES
IN THE
COURT OF COMMON PLEAS.

MICHAELMAS TERM, 28 VIC. (1864).

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

THE MUNICIPALITY OF THE CORPORATION OF THE TOWNSHIP
OF THURLOW V. BOGART.

*Action for cutting away, removing and destroying a bridge—Pleading—
Demurrer to Plea.*

Declaration, that defendant wrongfully and injuriously cut away, removed and destroyed a bridge, belonging to the plaintiffs, across the river Moira, in the township of ThurLOW, on the line of road and public highway leading through the township of ThurLOW to the townships of Tyendinaga and Hungerford.

Plea, that the river Moira, where, &c., and when, &c., was a navigable river and public highway for the conveyance of timber, &c., down same, to Bay of Quinte, and has been and still is used for such purpose; that in navigating such timber, &c., it was necessary to navigate same in the river, where it is crossed by the bridge; that defendant with others was engaged in conveying timber, &c., down the river to the Bay of Quinte; that the free navigation of the river for the passage of timber, &c., at the time when, &c., was obstructed and hindered by the bridge, in consequence whereof the timber, &c., of defendant, with those of other persons in the course of such navigation came against the bridge, thereby causing the alleged injury and damage to the same, which were unavoidable and could not have been prevented by due and reasonable care and diligence of the defendant.

Held, on demurrer, plea bad, for not disclosing such a state of facts as to constitute the bridge a nuisance, or to shew that the acts complained of were really inevitable on the part of the defendant in consequence of the improper construction of the bridge, or by reason of a superior agency operating against the defendant; and for not alleging that the defendant was acting with due and reasonable care and diligence in the navigation of his timber.

Seemle, that had the plea stated that the damage was occasioned by reason of the bridge having been so improperly built as in effect to be a nuisance to the free navigation of the river, and that the damage was not caused by the negligence or improper conduct of the defendant, and could not have been avoided, it would have constituted a good defence.

Con. Stats. U. C., ch. 48, observed upon.

The first count of the declaration stated that the defendant wrongfully and injuriously cut away, removed, and destroyed a bridge belonging to the plaintiffs, across the river Moira, in the township of Thurlow, in the county of Hastings, on the line of road and public highway leading through the township of Thurlow to the townships of Tyendinaga and Hungerford, in the said county.

The second count stated that there was such township road and highway, being a township or road allowance which crossed the river Moira; that the plaintiffs, in the performance of their duty and for the use of all persons travelling along the road, caused to be erected the said bridge across the Moira, on the line of the said road or highway; yet the defendant wrongfully and injuriously cut down, destroyed, removed, and carried away the said bridge, and thereby obstructed the road, and by reason thereof the plaintiffs became liable to rebuild.

The third plea to the first count stated that the river Moira, where, &c., and when, &c., was a navigable river and public highway for the conveyance of timber and saw logs down the same to the Bay of Quinte, and has been and still is used for such purpose; that in navigating such timber and saw logs down the river, it was necessary to navigate the same in the river where it is crossed by the bridge; that the defendant, with other persons, was engaged in conveying a large quantity of timber and saw logs down the river to the Bay of Quinte; that the free navigation of the river, for the passage of timber and saw logs, at the time when, &c., was obstructed and hindered by the bridge, and in consequence thereof the timber and saw logs of the defendant, with the timber and saw logs of other persons, in the course of being navigated down the river to the Bay of Quinte, came against the bridge and thereby caused the alleged injury and damage to the same, which were unavoidable, and could not have been prevented by due and reasonable care and diligence of the defendant, and which are the injury and damage complained of.

The third plea to the second count was the same as the third plea to the first count.

The plaintiffs demurred to these to pleas, and stated various causes of exception to them, which may be stated in effect as follows:—

That the admission of the defendant that the timber and logs came against the bridge and caused the injury does not answer the charge of the plaintiffs, that the defendant wrongfully and injuriously cut away, removed and destroyed the bridge, nor show any justification for the acts complained of.

That the defendant does not show it was necessary or proper or reasonable to navigate the timber and logs against the bridge, or that he used any or proper or reasonable care in conveying the lumber down the river.

That the defendant did not give notice to the plaintiffs to remove the bridge.

That it does not appear the defendant could not have exercised his right without injury to the bridge.

That the defendant should have alleged the bridge, was improperly built, or occupied so much of the river as to prevent the free use of it.

That the defendant does not show he had any occasion to use the river as a highway at the time when, &c.

S. Richards, Q. C., for the dumurrer. The plea does not show that the defendant tried to avoid doing damage to the bridge, nor that it was necessary for him to get his timber and saw logs into the position in which they were when the damage was done to the bridge. At the most it shows that the defendant, having by his negligence or wilfulness navigated his timber and logs into the position in which they were when the damage was occasioned, could not then, in consequence of the situation of the timber, avoid doing injury to the bridge. A party, before he can justify the abatement of a public nuisance by destroying it, must shew such destruction necessary for the proper use of the property which the nuisance obstructs. The cutting away of the bridge is in no way justified; the plea merely shows that the timber came against the bridge; it should show a clear and unanswerable case, which it does not—that the timber could not avoid the bridge. *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 Q. B. 870; *Mayor of Colchester v. Brooks*,

7 Q. B. 339; *Eastern Counties Railway Co. v. Dorling*, 5 C. B. N. S. 821.

Bell, for defendant. All the damage stated in the declaration may have happened, as it is alleged it did, from the timber and logs coming against the bridge. The bridge may have been cut away by such means. It is admitted that the bridge obstructed the free navigation of the river for the passage of timber and saw logs. *Little v. Ince et al.* 3 U. C. C. P. 528; U. C. Con. Stats. ch. 48, ss. 15-16; *Vickers v. Overend*, 7 H. & N. 92; *The Queen v. Meyers*, 3 U. C. C. P. 322.

A. WILSON, J., delivered the judgment of the court.

The declaration states what appears by various sections of the Municipal Act (ss. 315, 331, 335, 336, 337) to have been a rightful erection in this bridge over the river, and not a nuisance. If it had been a nuisance, the pleas probably show a sufficient substantial justification for the acts complained of, because they show that the bridge crossed the river, that is, that it extended from one bank completely to the other, so that no part of the river could be navigated from above to below the bridge without passing in or along the very line of the bridge either under the bridge or against it; because they show also the defendant was in the exercise of a lawful right in conveying his timber down the river; and because it is alleged that the bridge obstructed the free navigation of the river for timber, and that the injury was unavoidable. But as it does not appear to be a nuisance, the defendant must not, in the exercise of his highway rights under the bridge, do any damage to the plaintiffs' property in the bridge and to the highway rights upon or above the bridge, unless he is prepared to show that the same was occasioned by reason of the bridge being so improperly built as in effect to be a nuisance to the free navigation of the river, and that such damage was not occasioned entirely by his own negligence or improper conduct.

The defendant excuses the destruction of the bridge by pleading the coming of his timber and logs against it as an unavoidable act, which could not have been prevented by due and reasonable care and diligence on his part, by reason

of its obstruction and hindrance to the free navigation of the river for the passage of such timber and logs.

He does not say that he did use due and reasonable care and diligence in the navigation of his timber and logs ; and if he did not, he cannot be excused in cutting away and destroying the bridge. He simply says the damage was unavoidable, and could not have been prevented by due and reasonable care on his part. But why did he not try to use due and reasonable care ! For if he had, perhaps, the damage might not have been unavoidable.

If this had been alleged, I am inclined to think the plea would have afforded a substantial defence ; for the defendant could not be made answerable for a mere accident arising in the performance of a lawful act, from superior agency, which he could by no care on his part prevent or provide against.

I think the pleas, if well pleaded in this respect, would have excused *prima facie* the whole charge of cutting away, removing and destroying, contained in the declaration ; for cutting away may be said to have been occasioned not inappropriately by the timber going directly through the bridge and separating it in two, just as one ship is said to have cut another in two when she violently strikes her with the bow and divides the fore from the after part, or when a shot is said to have cut away a mast : the meaning is often that mere continuity has been destroyed.

While the expression is capable of this meaning, and the defendant has thus interpreted it, we cannot say on demurrer he is wrong in doing so. The facts may, perhaps, show that another species of cutting was in fact practiced by the defendant than he has here confessed. If so, he must be prepared to justify it, if the plaintiff be at liberty to show any other cutting, without either amending his declaration or new assigning.

The removing and destroying seem also to be *prima facie* answered by the plea ; for the timber and logs, by their motion and impetus, might have done both these acts.

It would seem to have been proper that this defence should have been pleaded specially, because, if the accident did not result entirely from a superior agency, the facts

would not have been a defence and could not have been proved under the general issue. *Hall v. Fearnley* (3 Q. B. 919).

This is a question which cannot be satisfactorily determined upon demurrer. The court can merely say that a bridge, part of a public highway across a river, which is also a highway, may be built and be no nuisance so long as it is no damage to the navigation. It is true, it is stated here that the bridge obstructs the free navigation of the river for the passage of the timber, but what the extent or character of that obstruction may be we cannot tell; and "a bridge may be so built in a navigatable river as to be no obstruction," per Lord Campbell, C. J., in *Reg. v. Betts* (16 Q. B. 1038).

We think the pleas do not show such a state of facts as to constitute the bridge nuisance, or to shew that the acts complained of were really inevitable on the part of the defendant, by the improper construction of the bridge, or by superior agency operating against the defendant, and that he, the defendant, was acting with due and reasonable care and skill in the navigation of his timber.

If these facts appear, we think the plea could be sustained in law as a valid answer to the action.

We have not referred to the U. C. Act, ch. 43, because the pleadings are not framed with regard to it. The defendant does not, according to section 15, plead that he was floating his trees and logs down in the spring, summer, or autumn freshet; nor has, under section 16, alleged there was no convenient apron, slide, gate lock, opening, in any such dam or other structure, made for the passage of saw logs, &c. But perhaps this act may be referred to for the purpose of determining what structure of a bridge would not be a nuisance, taking into consideration the nature of the stream and the rise of the freshets, and the kind of saw logs and other timber, rafts and crafts, which have been ordinarily floated down or may be floated down at these seasons.

Judgment for plaintiffs on demurrer.

THE QUEEN V. PARKER.

*Forgery—Order for money not addressed—Evidence—Con. Stats. C.,
ch. 94, sec. 13.*

A writing, *not addressed to any one*, may be an order for the payment of money within Con. Stats. C., ch. 94, sec. 13, if it be shewn by evidence for whom it was intended.

In this case the order was for \$15, in favour of "bearer or R. R.," and purported to be signed by one "B." The prisoner in person presented it to M., representing himself to be the payee and a creditor of "B."

Held, that it might fairly be inferred to have been intended for M.; and a conviction for forgery was sustained.

The prisoner was indicted at the last Fall assizes for the united counties of Huron and Bruce for forgery, and found guilty.

The indictment contained three counts. 1st. Forging order for payment of money from Wm. Buchanan.

2nd. Forging order, setting it out in these words:—"September 2nd, 1864. Let the bearer, or Robert Reid, have the sum of fifteen dollars, and charge to my account. WILLIAM BUCHANAN,"—with intent thereby to defraud.

3rd. Uttering the forged order, well knowing, &c.

The trial took place before *Hagarty, J.* It was proved that the instrument was a forgery by evidence, besides the admission of the prisoner, who, after the usual caution by the committing magistrate, admitted that he was guilty, and that he had written the order, and presented it to Mr. Mellish.

Jane Mellish, the wife of Robert Mellish, said:—"I live in Tuckersmith. My husband keeps a small store there. The prisoner came to the shop, and asked if we would give goods on William Buchanan's order. We knew one of that name in Hay: no other. I said I would ask my husband, who was then out. Prisoner said he would be back in the morning. My husband, when he returned, agreed to give goods. Next morning the prisoner called and presented the order now produced. I asked if it was Buchanan's order. He said yes, and that his name was Robert Reid. Nothing was said as to which William Buchanan it was. The order was \$15. We gave him the amount. I asked him where he lived. He said with Mr. Buchanan's father-in-law, in the bush; and this order was for part of his wages. He said he lived near Buchanan's father-in-law; did not say where.

I knew Buchanan had a father-in-law. I asked him if Buchanan was going to leave that part. He said no. He took the goods away."

Macdermott, for the prisoner, objected that the document was invalid, and not the subject of forgery ; that it was not addressed to any one ; that Mellish was not bound to accept it, and could not recover it from Buchanan if genuine. The learned judge inclined against the objection, but thought it a sufficient ground for reserving the case. He left it to the jury generally. The prisoner was convicted, but sentence was not passed ; and in pursuance of ch. 112 of Con. Stats. U. C., the question was reserved for the consideration of Her Majesty's Court of Common Pleas, and the opinion of that court was requested thereon.

During the present term the case was argued by *Harrison* for the Attorney-General. He cited Con. Stats. C. cap. 94, sec. 13 ; *The Queen v. Tuke*, 17 U. C. Q. B. 296 ; *Manning v. Mills*, 12 U. C. Q. B. 515 ; *Williams v. Lake*, 6 Jurist, N. S. 45 ; *Williams v. Byrnes*, 8 L. T. N. S. 69 ; *The King v. Cullen*, 1 Moo. C. C. 300 ; *The King v. Carney*, 1 Moo. C. C. 351 ; *The Queen v. Pulbrook*, 9 C. & P., 37 ; *The Queen v. Regus*, 9 C. & P. 41 ; *The Queen v. Snelling*, 6 Cox 230 ; S. C., 1 Dear 219 ; *The Queen v. Dennie*, 1 Cox. 178. He contended that, although the order was not addressed to any one, it was open to shew for whom it was intended ; that, in this instance, it was to be gathered from the evidence that the prisoner intended it for Mellish.

C. Robinson, Q. C., contra, contended that nothing was shewn from which it could be gathered for whom the order was intended ; and even if so, it was not the subject of an indictment for forgery. He cited Arch. Cr. Pl., edn. of 1859, 496 ; Ros. Cr. Ev., last ed., 497-501 ; *The Queen v. Walters*, 1 C. & M. 588 ; besides several other cases already cited.

J. WILSON, J., delivered the judgment of the court.

The law as we, deduce it from these cases, is, that if the evidence shews for whom an order like this was intended, although not addressed to that person by name, it is an order within the meaning of the statute, and the subject of an indictment for forgery. *The Queen v. Snelling* (6 Cox. 230)

S. C. (1 Dear. 219). Now, on presenting it, the prisoner asked if Mellish would give goods on Buchanan's order; fairly implying, as we think, that the order was intended for him. Next morning he was asked if it was Buchanan's order. He said yes, and his name was Robert Reid; upon which he got the amount, giving Mr. Mellish to understand it was for part of his wages.

If this order had been negotiated, so that it had become uncertain for whom it was intended, a reasonable doubt might have arisen; but the evidence is that the prisoner drew the order, presented it to Mellish, representing himself as the payee and creditor of the drawer, and took away the goods, which he had received in payment of it. Under these circumstances, the fair inference is that the prisoner intended it for Mellish; and we think we shall not be doing him injustice in precluding him from setting up that it was not intended for Mellish, or at least uncertain for whom *he* intended it. We think the conviction right.

Conviction affirmed.

THE QUEEN V. MCPHERSON.

Sci. fa.—Bond to the Crown by and on behalf of deputy postmaster—Con. Stats. Can. ch. 31, subsec. 2 of sec. 64—Joint and several obligors—Propriety of Procedure—Demurrer.

The defendant went into joint and several bond to the Queen with D. and S., for the faithful discharge by S. of the duties of deputy postmaster at O. On *sci. fa.* against defendant on the bond, he appeared, and, upon its being set out on oyer, demurred to it, on the grounds, first, that a bond of th's nature should, since the passing of the "Post Office Act," have been proceeded on by suit in the name of the *Postmaster General*, and not by *sci. fa.*, or at the instance of the Attorney-General; secondly that the proceedings should have been against the parties to the bond jointly, or it should appear why the other parties were not joined.

Held, that though the statute may authorize the Postmaster-General in such cases to sue in his official name, the words "or otherwise" contained therein do not deprive the Crown of the right to *sci. fa.* on a bond taken expressly in the name of the Queen.

Held, also, that the Crown may have *sci. fa.* against one or against all of the joint and several obligors of a bond, but that the proceeding must be against *all* or *each one*.

This was a *sci. fa.* brought against James McPherson, who, with one Drinkwater, on the 30th day of April, 1861, had entered into a joint and several bond to our sovereign

lady the Queen with Edwin Graham Slee, and as his surety, for the due and faithful performance by Slee of the duties of deputy postmaster at Orillia.

McMichael appeared for the defendant, cravedoyer of the bond, set it out, and demurred. He showed for causes of demurrer, first, that the bond being given for the performance and faithful discharge of his duties by a postmaster after the passing of the act of this Province known as the "Post Office Act," the proceedings should have been by action on the bond, instituted in the name of the postmaster-general, and not by *sci. fa.*, or at the instance of the attorney-general; second, that the proceedings should have been against the parties to the bond jointly, or it should appear why the other parties had not been joined. In support of the demurrer he contended that subsection 2 of section 64, Con. Stats. Can. ch. 31, which enacts that "all suits to be commenced for the recovery of debts or balances due to the Post Office, whether they appear by bond or obligation made in the name of the existing or any preceding Postmaster-General or otherwise, shall be instituted in the name of the Postmaster-General," took from the Crown the right to *sci. fa.* and reduced the remedy to a suit on the bond in the name of the Postmaster-General; that the words "or other wise" are to be constructed so as to include bonds taken in the name of the Queen, and so as to take away the right of the Crown to *sci. fa.* on a bond like the one in question, citing, on this point, *The Attorney-General v. Sewell*, 4 M. & W. 77; that if *sci. fa.* was the remedy, all the parties should have been indicted, or it should have been shown why they were not. Foster on *Sci. Fa.* 21; Bacon's Abr. *Scir Fa.* 105; *The King v. Young and Glennie*, 2 Anstruther, 448; *The King v. Chapman*, 3 Anstruther, 811; 1 Wms. Saunders, 291, c.

S. Richards, Q. C., contra. The proceeding is on a bond to the Crown, and is not a suit for a debt due to the Post Office. The bond is conditioned for the performance of various acts; and though one is for the payment over of monies received as postage, still it is only one of many. The section of the act referred to was never intended to meet a case of this kind. He cited *Judd v. Read*, 6 U. C. C. P. 362; *Webster v. Macklin*, 4 U. C. C. P. 266; Con-

Stats. C. ch. 12, sec. 8; *Attorney-General v. Sewell*, *supra*; Foster on *Sci. Fa.*, *supra*; 7 Bacon's Abr. *Sci. Fa.* ch. 2, 7th ed, 135; 2 Wms. Saunders, 71, c.

J. WILSON, J., delivered the judgment of the court.

In matters involving questions "for the recovery of debts or balances due to the Post Office," the remedy by suit in the name of the Postmaster-General may be much more convenient than *sci. fa.*; but we fail to see that the words "or otherwise" deprive the Crown of the right to have *sci. fa.* on a bond taken expressly in the name of the Queen, as this bond was taken. It may authorize the postmaster-general, in such cases, to sue it in his official name; but would this deprive the Crown of its ancient remedy? Or if it did, how can the court say that this suit is either for debts or balances due to the Post Office? We have been referred to the case of the *Attorney-General v. Sewell*. It was an information filed by the Crown, simply stating that the defendant had been assessed in certain taxes; that a warrant had been issued against him; but that the amount had not been and could not be collected under it, and that the same remained due and unpaid; whereby an action had accrued, &c. The information was supported at the trial by the production of the assessment itself from the tax office, in which the defendant was found to be in arrear for the money stated in the information. It was contended on the part of the Crown that by the 5 and 6 Wm. IV. ch. 20, sec. 13, the assessment was made conclusive evidence; but it was objected by *Price*, for the defendant, that the statute made the debt recoverable *as a debt of record*, and that the Crown could only recover a debt of record by *sci. fa.*, or extent, or by filing an information upon the record itself. The defendant had judgment. Lord Abinger, C. B., said, "We know of no means to recover the arrears as a debt upon record, except by *sci. fa.* or by extent, or by filing an information upon the record itself." That case was the converse of the present. It was an attempt to recover on an information, in the nature of a popular action of debt, that which was recoverable only by one of the modes mentioned in the judgment. He also asked, "As the Crown had a summary power to recover the

debt, why should they be put in a worse situation by being obliged to bring a popular action of debt?" Now, it is this very course which the defendant contends the Crown must take; that is, bring a popular action of debt to make a claim which is already of record, a claim of record. For these reasons, we think the statute does not deprive the Crown of its remedy by *sci. fa.*

Then as to the second point. The general rule is, that if a statute, judgment, recognizance, bond, &c., be joint and several, all must be used, or each severally. *Bac. Ab. sci. fa.* 135; 2 *Rolls Ab.* 468. If A., B. & C. bind themselves jointly and severally in a statute, the conusee may have execution against one alone or all together; he cannot have execution against two only, for the execution must pursue the statute, which is joint and several; but execution against two is neither the one nor the other.

The King v. Young and Glennie, and *The King v. Chapman*, are to the same point. The case of *Chapman* was on a bond. The two sureties were used. Held, two could not; all or each should have been. In *Young and Glennie* the writ was quashed because two out of four were used. There it was said the Crown should have proceeded against all jointly, or against each separately.

We think the point admits of no doubt on the authorities. The Crown may have *sci. fa.* against one or against all of joint or several obligors of a bond.

On both grounds there will be judgment for the Crown on the demurrer.

BROWN V. GOSSAGE ET AL.

Action against maker and four endorsers of a note—Payment by two endorsers—Assignment of judgment under 26 Vic. ch. 45, secs. 2, 3.

G. made a promissory note to S. who endorsed it. DeG., D. and W. also indorsed it. B. discounted the note, which, not having been paid at maturity, was sued, and judgment and execution obtained against all the parties to it W. satisfied the execution, whereupon G. and D. paid him, (he having been a mere accommodation endorser) S. and DeG. contributing nothing towards the payment. G. and D., thereupon, applied to B., under 26 Vic., ch. 45, secs. 2, 3, for an assignment to them of the judgment so obtained by him, in order to levy from S. and DeG. their share of the liability. This B. refused, S. and DeG. having informed him that by agreement they were to be relieved of liability.

Held, on application by G. and D. for an order to compel B. to assign to them the judgment, that on the authority of *Phillips v. Dickson*, 29 L. J. C. P. 223, decided under Imp. Act 19 and 20 Vic. ch. 97, sec. 5, which in this respect is the same as Can. Act, 26 Vic. ch. 45, secs. 2, 3, the court had no power to grant the order.

On the 29th October, 1864, *McBride* on behalf of Gossage and Doyle, obtained a summons in chambers calling upon the plaintiff to shew cause why he should not assign the judgment in this cause to them, or to a trustee for them, on the ground that they, or Wood, one of the defendants, for them, had paid the judgment, and that Scott and DeGrassi, the two remaining defendants, were still liable to them for their just proportion of the debt.

It appeared, that Gossage had made a promissory note to Scott, who had endorsed it; that DeGrassi and Doyle had also endorsed, all of them being desirous of obtaining the money upon it for a joint enterprise. Wood, the last endorser, had endorsed it for their accommodation. Being thus endorsed, the plaintiff discounted it, and not being paid at maturity, the plaintiff put it in suit, obtained a judgment and issued execution. Wood satisfied plaintiff, and Gossage and Doyle thereupon satisfied him, Scott and DeGrassi contributing no part.

The object of Gossage and Doyle was to get the judgment and execution assigned to them, that they or their trustee might levy from Scott and DeGrassi their share of the liability.

Moss, on behalf of Brown, shewed cause, and filed Brown's affidavit, stating that he had been paid, as he understood, through Gossage, Doyle or Wood; that on communicating this application to Scott and DeGrassi, they had informed him that by the arrangement they were to be discharged from their liability; and that a suit had been brought in August last by Gossage and Doyle against them on this claim. He expressed his willingness to abide the decision of the court as to whether he should, or should not assign the judgment to them.

J. Wilson, J., being in chambers, enlarged the summons till the fifth pay of term, when *McBride* moved a rule *nisi* as in the summons.

During term *Moss* shewed cause :—The case is not within the statute 26 Vic. ch. 45. It is not the case of a surety for the debt or duty of another, or a liability with another for any debt or duty ; but it is the case of the maker and one endorsed seeking to enforce payment for two other endorsers of an alleged share of a joint dealing with the plaintiff,—a predicament not contemplated by the statute. He cited Imp. Stat. 19 & 20 Vic. ch. 97 sec. 5 ; 26 Vic. ch. 45 secs. 2, 3 ; *Phillipps v. Dickson*, 29 L. J. C. P. 223.

MBride, in support of the rule :—The defendants were liable with one another for the debt to Brown, which Gossage and Doyle have paid. They can, therefore, avail themselves of the statute, without regard to their relationship to each other on the note ; and are consequently entitled to the assignment asked for. Scott and DeGrassi cannot be injured for these applicants cannot levy of them more than their just share ; any attempt to levy more would be restrained by the court. He cited 26 Vic. cap. 45, secs. 2, 3 ; *Phillips et al. v. Dickson*, 29 L. J. C. P. 223.

J. WILSON, J., delivered the judgment of the court.

The 5th sec. of the Imperial Statute (19 & 20 Vic. ch. 97) is like the Provincial Statute (26 Vic. ch. 45 sec. 2), on the authority of which this application has been made.

Two questions arise here : 1st. Are these applicants entitled to what they ask ? and 2nd. Has the court the power to grant it ?

If the court has not the power to grant this application it will be unnecessary to consider the first point.

The case of *Phillips et al. v. Dickson*, was this :—A. and B., two of the managing committee of a mining association, had been sued in separate actions by the solicitor to the association for £581 15s., the balance of his bill of costs. In the action against A. a verdict was taken by consent for £500, payable by instalments. Judgment was not to be entered unless A. made default. He did make default, upon which judgment was entered, and he paid the debt and costs. The action was stayed by a judge's order, on payment by B. of £550 by instalments, without prejudice to any rights the plaintiff might have against other persons in respect thereof.

A. having applied under the 5th section to have the judge's order assigned to him, the court held that they had no power to make an order under that act.

Willes, J., said—"Unless this act expressly gives the court jurisdiction to proceed by way of motion and order, we cannot help the defendant. He may apply to the plaintiffs to assign the order, and if they refuse he can bring an action."

Byles, J., said—"The defendant has his remedy to enforce contribution, without any assignment of the judgment." And *per curiam*—"The court has no power to make the order."

On the authority of this case we refuse the order moved for.

Rule discharged with costs.

CROOKS V. DICKSON.

Action on covenant to pay rent—Equitable plea—Demurrer.

Declaration, that plaintiff by deed let to defendant a lot of land, situate, &c., to hold for 21 years from 1st June, 1854, at a rent payable half-yearly, free from all taxes or other deductions, and defendant by said deed covenanted with plaintiff to pay him the same as aforesaid, yet five years of said rent and taxes are due and unpaid.

Plea, on equitable grounds, that said rent was reserved upon a demise of certain lands made by plaintiff and others to defendant by indenture, dated 24th May, 1854, and made between plaintiff of 1st part, J. C. and J. F. S., mortgagees of the lands amongst other lands thereafter mentioned, of the 2nd part, L. C., wife of plaintiff, of 3rd part, and defendant of the 4th part; whereby plaintiff and the other parties to said indenture, except defendant, pretended to demise to defendant said lands, in respect of which said rent was reserved, and which said premises were composed of, &c.; that plaintiff and the other parties to said indenture, other than defendant, claim and derive title to said premises, and at the time of making said demise, claimed and derived title to same, under a conveyance thereof by one G. H. M. to plaintiff, being an indenture of bargain and sale between said G. H. M. and plaintiff, dated 29th March, 1854, whereby said G. H. M. pretended to convey to plaintiff all said premises in fee, who afterwards pretended to convey certain interest in said premises to the other parties to said indenture, who joined in said demise to defendant. That upon the making of said demise, and before said conveyance by said G. H. M. to plaintiff, and whilst said G. H. M. was seised in fee of said premises, to wit, on 1st July, 1841, said G. H. M. *contracted and agreed with one H. G., now deceased, to sell and convey to him in fee a certain large portion of said demised premises, being all, &c., and said G. H. M. then contracted and agreed with said H. G., that he, said H. G., should have and retain possession of said last mentioned premises until said contract of purchase was performed by said H. G., on his part, and that then he, said G. H. M., would convey same to said H. G., and his heirs in fee: that thereupon, to wit, on said 1st July, 1841, said G. H. M., in pursuance of said contract, let said H. G. into possession of same, and said H. G., retained such possession until some time in 1843, when he died*

intestate, leaving H. G., his only son and heir at law, who thereupon entered into and retained possession, under said contract of purchase, until he also died intestate in 1859; whereupon one J. G., the mother of the said H. G., and as such the heir-at-law during her life of the said H. G., under said contract of purchase, entered into and retained possession of the same continually from the death of the son, H. G., until after the commencement of this suit; *that such possession of said H. G., the son, and J. G., the mother, was of right under said contract, and that by reason thereof* defendant did not and could not enter into the possession or hold or enjoy said last mentioned land so being parcel of said demised premises, or any part thereof; that, although defendant has always since the making said supposed demise been ready and desirous of entering into possession of said last mentioned land, of which plaintiff had due notice, yet that he has always been and still is kept out of the same by reason of said contract of sale, which bound said plaintiff and the others joining in said demise, as the assignees of said G. H. M., and thereby defendant has been wholly prevented from entering into and enjoying said portion of said demised lands, and from receiving the profits which would otherwise have accrued to him therefrom.

Held, on demurrer, plea bad. That at most it shewed only a parol demise and that only as to part of the premises; that H. G. was merely tenant at will or at sufferance, and liable to be ejected by defendant; and that relief, if any, would only have been apportionate, and upon terms, in a court of equity.

The declaration stated, that the plaintiff by deed let to the defendant a certain lot or parcel of land situate in the City of Toronto, in the County of York, to hold for twenty-one years from the first day of June, A.D. 1854, at the yearly rent of two hundred and ten pounds a year, payable half-yearly, on the first days of June and December respectively, free from all taxes or other deductions, and the defendant by the said deed covenanted with the plaintiff to pay him the same as aforesaid; yet five years of the said rent and taxes are due and unpaid.

Plea, on equitable grounds, that the rent in the declaration mentioned was reserved upon a demise of certain lands and hereditaments made by the plaintiff and others to the defendant by a certain indenture bearing date the twenty-fourth day of May, A.D. 1854, and made between the said plaintiff of the first part, John Cameron and Jas. Frederick Smith, both of the City of Toronto, Esquires, mortgagees of the lands and hereditaments, amongst other lands thereafter mentioned and intended to be thereby demised, of the second part; Louisa Crooks, the wife of the said plaintiff, of the third part: and the said defendant of the fourth part; whereby the plaintiff and the other parties to the said indenture, except the defendant, pretended to demise to the defendant the said lands and hereditaments in respect of

which the said rent in the declaration mentioned was reserved, and which said premises were composed of all and singular that certain parcel or tract of land and premises situate on the south side of Colborne street in the said city of Toronto, being composed of part of lot number one on the north side of Wellington street, formerly Market street, in the said city of Toronto, and being one hundred and thirty-four feet more or less in frontage on Colborne street, westerly from Scott street towards Yonge street to the parcel of land previously sold by the said plaintiff to Messrs. Shaw, Turnbull & Co., by the depth south of eighty-six feet on Scott street more or less to a lane, as laid out by the said Robert Pilkington Crooks, which said lane is fifteen and a half feet in common more or less to the hereby conveyed property and the property of the said plaintiff, and of Messrs. Shaw, Turnbull & Co., on Wellington street, then westerly from Scott street parallel to Colborne street one hundred and thirty-four feet more or less, then northerly parallel to Scott street eighty-six feet more or less to the southern limit of Colborne street; and the defendant says that the plaintiff and the said other persons, parties to the said indenture, other than the defendant, claim and derive title to the said premises, and at the time of the making of the said demise claimed and derived title to the said premises under and by virtue of a certain conveyance thereof by one George H. Markland to the plaintiff, being by indenture of bargain and sale made between the said George H. Markland and the plaintiff, dated the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-four, whereby the said George H. Markland pretended to convey all the said premises to the plaintiff in fee, who afterwards pretended to convey certain interest in the said premises to the other parties to the said indenture, who joined in the said demise to the defendant.

And the defendant further says, that before the time of the making of the said demise to the defendant, and before the said conveyance by the said George H. Markland to the plaintiff, and whilst the said George H. Markland was seised in fee of the said premises, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and

forty-one the said George H. Markland contracted and agreed with one Hugh Glenn, now deceased, to sell and convey to him the said Hugh Glenn in fee a certain large portion of the said demised premises, being all that certain parcel or tract of land and premisse situate, lying and being in the city of Toronto, containing by admeasurement three thousand nine hundred and fifty-six square feet, more or less, and which is more particularly known and described as follows, that is to say, lot number four in the survey of the said George H. Markland, of what was called Baby place, dated on or before the eleventh day of March, one thousand eight hundred and thirty, and being forty-six feet or thereabouts on Scott street, eighty-six feet or thereabouts in depths; and the said George H. Markland then contracted and agreed with the said Hugh Glenn that he, the said Hugh Glenn, should have and retain the possession of the said last mentioned premises until the said contract of purchase was performed by the said Hugh Glenn on his part, and that then he the said George H. Markland would convey the said last mentioned premises to the said Hugh Glenn and his heirs in fee; and the defendant further says, that thereupon, to wit, on the said first day of July, in the year of our Lord one thousand eight hundred and forty-one, the said George H. Markland, in pursuance of the said contract and agreement, let the said Hugh Glenn into the possession of the said last mentioned premises; and the said Hugh Glenn retained such possession until some time in the year of our Lord one thousand eight hundred and forty-three, when he died intestate, leaving him surviving one Hugh Glenn, his own son and heir at law, who thereupon entered into possession of the said last described premises, and retained such possession under the said contract of purchase until he also died intestate, in the year of our Lord one thousand eight hundred and fifty-nine; whereupon one Jane Glenn, the mother, and as such the heir-at-law for the term of her life, of the said Hugh Glenn, the son entered into possession of the said lands and premises, under and in pursuance of the said contract and agreement of purchase and the said Jane Glenn retained such possession continually from the time of the death of Hugh Glenn, the son,

until after the commencement of this suit; and the defendant says, that such possession of the said Hugh Glenn, the son, and Jane Glenn, was of right under the said contract and agreement, and that by reason thereof the defendant did not and could not enter into the possession of or hold or enjoy the said last mentioned land, so being parcel of the said demised premises or any part thereof; and although the defendant has always from the time of the making of the said supposed demise hitherto been ready and willing and desirous of entering into the possession, use, occupation and enjoyment of the said last mentioned land, under and by virtue of the said demise, of which the plaintiff had due notice; yet the defendant in fact says, that he, the said defendant, always from the time of the making of the said demise until the time of the commencement of this suit was and still is kept out of the use, occupation, and enjoyment of the said last mentioned premises, and every part thereof by means of the said contract of sale, which bound the said plaintiff and the other parties who joined in the said demise as the assignees of the said George H. Markland, and thereby the defendant has been wholly hindered and prevented from entering into and holding and enjoying the said hereinbefore described portion of the said demised premises or any part thereof, and from having and receiving all the profits, benefits, and advantages which ought and would otherwise have arisen and accrued to the defendant therefrom.

Demurrer:—1st. That the said plea professes to answer the whole declaration, yet shews matter of defence to a part only of the plaintiff's cause of action.

2nd. That such matter of defence cannot be properly pleaded by way of equity in a court of law, because it involves questions of account and computation.

3rd. That it does not appear by the said plea that the alleged contract with Hugh Glenn was in writing, or was such as in point of law gave him, or those claiming under him, any right of occupation or possession, or constituted him or them more than tenant at will at the time of the said demise, or at any time.

4th. That it does not shew that the right of occupation aforesaid existed at the time of the said demise, or whether or not it had ceased in point of law.

The plaintiff also joined issue upon the plea, and likewise replied to it upon equitable grounds.

The defendant joined in demurrer, took issue upon the plaintiff's replication, and also demurred to the same. He also rejoined specially to the replication, whereupon the plaintiff, besides joining in demurrer to the replication and taking issue upon the rejoinder, also demurred to the latter.

These several later pleadings it is unnecessary to set out, or to allude to further than to state, that during a previous Term the demurrer to the replication had been argued, and judgment subsequently given in favour of the plaintiff: the demurrer to the plea had also been argued at the same time, but no judgment given upon it; it was therefore again set down for argument during the present Term, together with the demurrer to the rejoinder, both of which now came before the court to be disposed of.

Hon. J. H. Cameron, Q. C., for the plaintiff, cited *Neale v. McKenzie*, 2 C. M. & R. 84, S. C. 5 Tyr. 1106, and in the Exchequer Chamber, 1 M. & M. 747; *Woodfall on L. & T.* 301, 309; *Smith v. Malings*, Cro. Jac. 160; 1 R.'s Abr. 235; *Stevenson v. Lambard*, 2 Ea. 575; *Ecclesiastical Commissioners of Ireland v. O'Connor*, 9 Ir. C. L. Rs. 242.

Anderson, contra, cited *Holgate et al. v. Kay*, 1 C. & K. 341; *Stevenson v. Lambard*, *supra*.

RICHARDS, C. J., delivered the judgment of the court.

The plea, if good at all, must be a good plea at law; as a plea by way of equitable defence, it appears to me, it would not be considered operative unless it was good as a legal plea also. On the former argument this was admitted, I understood, by counsel for the defendant.

Is not the plea bad because it does not shew that the agreement entered into between Markland and Glenn was in writing, the same being for the sale of lands, and required to be in writing under the Statute of Frauds?

The general doctrine of pleading seems to be that a contract required by law to be made in writing need not be so

alleged in a declaration, but a plea setting up such a contract, or an alteration in its terms, must allege that the contract or alteration was made in writing. *Case v. Barber* (Sir T. Raym. 450); *Whittaker v. Mason* (2 Bing. N. C. 359); *Adams v. Wordley* (1 M. & W. 374), and other authorities establish this.

When a lease is set up it does not necessarily imply that it is in writing and by deed, for the lease may be good by parol for three years and from year to year, though there be no written instrument between the parties, if the lessee has entered into possession, or has continued to occupy, under the parol demise.

In *Neale v. McKenzie* the pleadings are set forth (2 C. M. R. 84, and 5 Tyr. 1106). The replication to the plea, justifying the entry and seizure of the defendant's goods as a distress for rent, sets up that one Charlton at the time of the demise to the plaintiff and thenceforth was in the possession and enjoyment of eight acres, parcel of the demised premises as *tenant* thereof to the defendant, whereby the plaintiff did not and could not enter into the possession thereof, or hold or enjoy the said eight acres, though plaintiff had always been ready, and willing, and desirous of entering into possession of the said land (eight acres) by virtue of the demise, of which defendant had due notice; yet he, the plaintiff, had been and still was kept out of possession of the said land by the act and default of the defendant, whereby plaintiff was prevented from entering into, holding, and enjoying the same.

In *Watson v. Waud* (8 Ex. 335), the action was in trover for taking plaintiff's goods and for excessive distress. The defendant pleaded the general issue of not guilty by statute. The defendant proved an agreement made on 13th May, 1851, to let certain premises at the yearly rent of £145, payable on 14th November and 14th May, until six months notice to quit, expiring at any time of the year, should be given. A former tenant, Mrs. Richardson, continued in possession of a cottage let to her at £5 a year, and possession could not be given to plaintiff pursuant to the agreement to let. The plaintiff, however, entered into and enjoyed all the rest of the property, and before the first half-year's

rent became due the parties met, and it was agreed that plaintiff should pay £70 to defendant on 14th Nov., 1851, and on 14th Nov., 1852.

In argument it was contended, when the agreement was entered into Mrs. Richardson was in lawful possession of her cottage as tenant to the defendant, and, therefore, as to that part of the premises the demise was void, for the defendant was unable to confer any interest in it. The court, however, considered, that what took place when the parties met before the first half-year's rent became due operated as a new demise, and gave the defendant a right to distrain.

It did not appear in that case that the first letting to Mrs. Richardson was by deed, nor that the lease to the plaintiff in that action was by deed, and the inference from the facts of the case as stated would be, that the latter holding was not by deed.

In *Holgate v. Kay* (1 C. & K. 341) the action was in covenant for non-payment of rent. The defendant pleaded two pleas. In the first he set out the lease, and concluded in substance by stating, that at the time of granting the lease part of the demised premises was in the possession of a third person, who had lawful title thereto, and that the defendant had been kept out of possession of the said part of the demised premises by such third person; and in the second plea, that certain persons had obtained right of way in and over the premises in question, and that by the exercise of such rights of way the defendant had been and was deprived of the use of the water privileges demised to him by the said lease.

From the facts of the case as disclosed at the trial, it appeared that there was a difficulty in getting possession of certain parts of a field and meadow covered by the lease, they being in possession of parties who claimed under the original lessor, the plaintiff holding under a lease derived through the same channel. It also appeared that certain parties had acquired rights of way over the land in question, so that a reservoir which the lessee wished to make there could not be made. The lessors were applied to by defendant either to put him in full possession of the premises de-

mised, or to make a ratable deduction of the rent. That application was refused, and plaintiff sued for the rent.

The learned judge who tried the cause ruled that plaintiff could not recover, and subsequently the case was brought before Coltman, J., and Baron Rolph, in the court of Common Pleas at Lancaster, these learned judges then sitting as judges of that court, and they held that the plaintiff could not recover. They sustained the ruling of Baron Rolfe, who held that it was perfectly clear that if a lessor could not give full possession of the thing demised he could not sue in covenant for rent. In discharging the plaintiff's rule the court referred to *Stevenson v. Lambard* (2 East. 575), where the court of King's Bench held, that is covenant as between the lessors and lessee, where the action was personal and upon a mere pivity of contract, and on that account transitory as any other personal action, the rent was not apportionable.

The case of the *Ecclesiastical Commissioners of Ireland v. O'Connor* (9 Ir. C. L. Reports, 242), is a strong authority for the plaintiff on the broad question of his right to recover, supposing the plea shewed an actual term created by the act of the plaintiff himself. In that case the court took this obvious dictinction between *Neale v. McKenzie* and the case before them,—that in *Neale v. McKenzie* the demise was for one year and by parol, and inasmuch as the lessee did not enter into the possession of the eight acres of land, nothing in it passed to the lessee by the parol demise and the overholding tenant being in, and in possession by a like parol demise, there was nothing to shew that as to those eight acres anything passed to the lessee. But in the Irish Courts it was ruled that the subsequent lease being by deed would pass any reversion after the expiration of the first lease, and that an interest, therefore, did pass to the lessee in the very premises held by the prior tenant, and in consequence the plaintiff might recover.

In order to sustain the plaintiff's rights to recover in this action it is not necessary to go as far as the case in the Irish Court has gone; for taking the facts as set up by the defendant's plea, they only shew that Glenn entered under a parol agreement to purchase from Markland. If that was so, then Glenn when he entered was only a tenant at will, or

at sufferance, and could not, nor could any one claiming under him, in any way at law resist an action of ejectment brought to recover possession of that portion of the demised premises. There was no term created, and he could have been ejected, and if he had applied to a court of equity to stay the proceedings at law he could only have done so successful by bringing in the unpaid purchase money. And in this action, if the defendant had applied to a court of equity to stay the proceedings at law, I apprehend the plaintiff would only be enjoined to stay his proceedings until the supposed rights of Glenn, or those claiming under him should be barred; and then the stay would only properly apply to that portion of the rent which ought to rise from the part of the land in Glenn's possession.

At law I fail to see how we can properly notice such rights as are set up in the plea, or how we can consider the interest, which was assumed to be in Glenn by the agreement with Markland, to be anything more than an equitable right, or a trust created by a parol agreement, which could not be recognized or enforced at law.

We are all of opinion that the plea is bad, and the plaintiff is entitled to our judgment. It seems unnecessary to consider the replication or subsequent pleadings.

Judgment for plaintiff on demurrer to the plea.

WILSON v. KEYS.

Action for a breach of covenant to deliver peaceable possession of premises—Equitable plea—Demurrer—New assignment—Demurrer—Past consideration—Nudum Pactum.

In an action of covenant by lessee against lessor on a covenant in a lease under seal to deliver possession of the demised premises to plaintiff on 29th March, 1864, assigning as a breach that defendant had not delivered possession to plaintiff, and had deprived him of the use of the land and premises, defendant pleaded, on equitable grounds, that plaintiff by an agreement in writing executed contemporaneously with the lease, in consideration that defendant *had* leased to him the premises mentioned in the declaration, which were then in the possession of one J. Y., who had agreed to surrender possession by the said 20th March, agreed not to bring any claim or damage against defendant, if possession could not be obtained on the day as provided in the deed, averring that on 20th March Y. was and continued in possession of the premises and refused to deliver them up to defendant, who, consequently, could not obtain possession thereof on the said day, and could not by reason thereof deliver possession on 20th March to plaintiff.

Plaintiff new assigned, that he brought his action as well for the causes attempted to be justified as for not giving possession of the premises 21st March.

Held, on demurrer to both plea and new assignment, that the plea was bad, as a legal defence, for attempting to alter an instrument under seal by one merely in writing not under seal; as a legal and equitable defence, for want of a good consideration, alleging, as it did, a past consideration as that on which the agreement was based. That if it was intended to be urged that the agreement was part of the instrument under seal, and executed contemporaneously with it, it was not stated; if executed before the lease, and as part of the consideration for making the lease, it was not so pleaded.

Held, also, that the new assignment was bad as enlarging the declaration.

The writ in this action was issued on the 24th March, 1864. The plaintiff averred in his declaration that the defendant by deed demised to him certain lands and premises, to hold for five years from the 20th March, 1864, and thereby covenanted to deliver up to the plaintiff on that day peaceable and quiet possession of the said lands and premises. Breach: that the defendant had not delivered to the plaintiff peaceable and quiet possession as aforesaid, although often requested so to do, and had deprived the plaintiff of the use and possession of the said lands and premises.

The defendant pleaded, on equitable grounds, that the plaintiff did, by his agreement in writing, signed by him, dated 22nd January, 1864, and executed contemporaneously with the deed in the declaration mentioned, in consideration that the defendant had leased to plaintiff the farm then occupied by one J. Young, being the premises in the declaration mentioned, and had agreed to give possession thereof on the 20th March then next, agree with defendant not to bring any claim or damage against defendant, if possession could not be obtained on the day and time as expected and provided for by said deed; and the defendant averred that on the said 20th March, Young still was and continued in possession and occupation of the said premises, and refused to deliver up the possession thereof to the defendant, and the defendant could not obtain possession thereof on the day aforeside as expected, and could not by reason thereof deliver to the plaintiff peaceable and quiet possession thereof on the said 20th March.

The plaintiff denied the making of the agreement set up in the plea, and also demurred to the plea. The causes of demurrer were, 1st, that the plea showed no valid consideration for the making of the agreement set up in the plea—that

such agreement was *nudum pactum* ; 2nd, that it attempted to set up an agreement not under seal in answer to the breach of an agreement under seal ; 3rd, that the agreement merely showed that the plaintiff agreed not to bring any claim for damages against the defendant for not delivering possession of the land on the 20th March, and was no answer to the plaintiff's claim for damages for being deprived of the possession since the 20th March, which he sought to recover, as well as for not delivering possession on that day ; 4th, that the plea set up no legal excuse for the defendants's breach of his covenant ; 5th, that the plea did not disclose any fact on which a court of equity would grant a perpetual injunction in this action.

The plaintiff also replied, that he used not only for the causes of action admitted and attempted to be justified, but that the defendant by his said deed covenanted with plaintiff to give him quiet and peaceable possession of the lands, as in the deed mentioned, on the 21st March, 1864, he the plaintiff to hold the same from that day forth for five years ; that defendant did not on said day give plaintiff quiet possession of the demised premises in the declaration alleged, and since said day and thenceforth to the commencement of the said suit the defendant had deprived the plaintiff of the use and possession of said demised premises, and had since said day frequently refused to give to the plaintiff possession of the same.

The defendant joined in demurrer, and demurred to the new assignment, assigning the following causes of demurrer thereto : 1st, that it was double, and amounted to a repetition of the declaration, and of the whole causes of action mentioned therein ; 2nd, that the covenant set out in the declaration was for delivery of possession of the premises on a day certain, and if that was excused the breach of the covenant was answered ; 3rd, that it was double in relying on the non-delivery of possession on the day named, on the 21st March and since, which was inadmissible.

Diamond, for the demurrer to the plea, cited Stephens on Pl. new ed. 132, 193, 290, 294 ; old ed. 260 ; Bullen & Leake's Precedents, 2nd ed. 393 ; *Brine v. G. W. R. Co.*, 31 L. J.

Q. B. 101; *Page v. Hatchett*, 8 Q. B. 187; *Worth v. Terrington*, 13 M. & W. 781.

S. Richards, Q. C., contra, and for the demurrer to the new assignment.

RICHARDS, C. J., delivered the judgment of the court.

We are of opinion that the plea is bad, both as a legal and equitable defence. It is wholly bad pleaded as a legal defence, because it attempts to vary or alter an instrument under seal by one that is merely in writing, not under seal. It is bad, both as a legal and equitable defence, for alleging a past consideration as that on which the agreement was founded. There are other objections also fatal to the plea. If executed contemporaneously with the agreement under seal, it might be a part of it, and might, if a part of it, operate by way of proviso that the plaintiff should not recover damages from the defendant on the covenant to deliver possession if Young did not give up possession by the 20th March; yet it is not set up as a part of the original agreement, but as a substantive agreement, for which it does not appear that there was any consideration. If the agreement, being a substantive agreement complete in itself, was prior to the covenant, and it was part of the consideration for giving the covenant, it is not so pleaded. If it was after the covenant, and of a similar character, there does not appear to be any consideration for it.

The new assignment appears to be equally open to objection. If the breach assigned in the agreement be a continuing one, and the agreement is of such a character that the omitting to give possession each day creates a new cause of action, and the breach is well assigned in the declaration, then if the plea does not answer the whole cause of action, it is bad, and ought to have been demurred to on that ground. If the plea is good, and answers all the causes of action set up in the declaration, then the new assignment enlarges the declaration and gives a new cause of action, which ought not to be left for the new assignment. The case of *Page v. Hatchett* (8 Q. B. 185) merely shows that when the action was brought for the conversion of a number of pieces of timber, and the defendant justified the taking

on the ground that they were obstructing a navigable stream, and that he removed them, and the plaintiff, in addition to replying *de injuria*, new assigned, this was held not to be bad; for the allegation of numbers in the declaration was divisible, and part might be obstructing the river and part not, and therefore the plea was good.

But in *Polkinhorn v. Wright* (8 Q. B. 197), where the action was trespass, and one count, showing but one trespass, committed on a singular occasion, the plaintiff having replied *de injuria*, it was held that he could not also new assign that the plaintiff committed the trespasses on different occasions from those mentioned in the plea. The notes to *Greene v. Jones* (1 Wm Saunders, 299), &c., are referred to as showing the cases in relation to new assignment. The rule seems to be, when there are more trespasses than one, some of which may be justified and some not, the declaration should state the trespasses on divers days or in different counts, so that the plaintiff may new assign if need be, or move on some of the other counts. *Ford v. Beech* (11 Q. B. 852) shows when an agreement suspending a right of action or remedy would be a bar to an action, and when it would merely give a party a right to bring an action on the agreement, if the remedy were attempted to be enforced.

On the whole, we think the plea bad, as well as the new assignment.

Judgment for the plaintiff on the demurrer to the plea, and for the defendant on the demurrer to the new assignment.

RAYSON V. GRAHAM.

Trespass—Plea of justification—Demurrer.

Trespass *quare clausum fregit*, upon the dwelling-house of the plaintiff without reasonable or probable cause, and under a false and unfounded charge and assertion that plaintiff had stolen property in his house, searching and ransacking the same, and making disturbance, &c., by which plaintiff was both interrupted in the quiet enjoyment of his dwelling-house, and suffered injury to his credit and character, by reason of a belief being excited in the community in consequence of such searching that he had stolen goods, and had them in his possession.

2nd count—That defendant broke and entered, &c., and stayed and made a noise and disturbance therein for a long time, and broke open the doors of said dwelling-house, and expelled plaintiff and his family from possession of said dwelling-house, and kept them expelled for a long time, whereby plaintiff during all that time lost and was deprived of the use of same.

Plea—That before the alleged trespasses in the declaration mentioned, as to the alleged breaking and entering of the dwelling house of plaintiff, certain goods of one W. were feloniously stolen by some person unknown, and were believed to be in said dwelling-house of plaintiff, with plaintiff's knowledge that they were so stolen; and defendants having such belief and the plaintiff having been seen in possession of same, at request of said W. and in his aid, immediately after the theft of same, in day-time, broke and entered said house, the outer door being open, for the purpose of searching for said goods, and there in said house did search and find said goods, which were then given up by plaintiff to defendant as goods of said W., which are the trespasses, &c.

Held, on demurrer, plea good, it clearly appearing from it that the goods were stolen; that they were in plaintiff's house (being found there); that they were taken by defendant at the owner's request and in his aid, immediately after the theft, the outer door of the house being open.

Declaration, that the defendants broke and entered the dwelling of the plaintiff, situate in the village of Brampton, in the county of Peel, and without any legal, reasonable or probable cause whatsoever, and under a false and unfounded charge and assertion, that the plaintiff had stolen property in his house, searching and ransacking the same and making disturbance, by which the plaintiff was not only interrupted in the quiet enjoyment of his dwelling, but his credit and character were and are injured by reason of a belief excited amongst his neighbors in consequence of such searching that he had stolen goods, and had them in his possession.

And for a second count the plaintiff says, that the defendants broke and entered a dwelling-house of the plaintiff, situate in the village of Brampton, in the county of Peel, and stayed and made a noise and disturbance therein for a long time, and broke open the doors of the said dwelling-house, and expelled the plaintiff and his family from the possession of the said dwelling-house, and kept them expelled for a long time, whereby the said plaintiff for and during all that time lost and was deprived of the use and benefit of his said last mentioned dwelling-house, to wit, at the village of Brampton, in the county of Peel.

Plea of justification, that before the alleged trespasses in the declaration mentioned, as to the breaking and entering the dwelling-house of the plaintiff in the declaration mentioned, certain goods of one Thomas Whitehead were feloniously stolen by some person unknown to the said Thomas Whitehead, and were believed to be in the said dwelling-house of the plaintiff, with the knowledge of the plaintiff

that they were so stolen, and the defendants, having such belief, and the plaintiff having been seen in the possession of the said goods, the defendants, at the request of the said Thomas Whitehead and in his aid, immediately after the goods were so stolen, in the day time, broke and entered the said dwelling-house, the outer door thereof then being open, for the purpose of searching for the said goods, and there in the said dwelling-house did search and find the said goods of the said Whitehead, so feloniously stolen as aforesaid, and the same were then given up by the plaintiff to the defendants as the goods of the said Whitehead, which are the same alleged trespasses in the declaration and introductory part of this plea mentioned.

Demurrer, that the plea is no answer to the action; that the mere suspicion of the plaintiff having stolen property in his possession afforded no ground or justification for defendants to enter into and break open plaintiff's premises without legal process.

Bell, Q. C., for the demurrer, cited *Smith v. Shirley*, 3 M. G. & S. 142; *Anthony v. Haney's et al.*, 8 Bing. 186; 3 Bl. Com. 4.

Hon. J. H. Cameron, Q. C., contra, cited Burns' Justice, vol. I., "Arrest," 272; vol. V., "Search Warrant," 840; Bl. Com. 3rd ed. 4; *Patrick v. Colerick*, 3 M. & W. 483; *Higgin v. Andrewes*, 2 Rolle's Rs. 55, 56; Rolle's Abr. 555, 556.

RICHARDS, C. J., delivered the judgment of the court.

The doctrine which prevailed for many years, that the owner of land in the possession of a tenant, could not justify entering on it, and putting out the over-holding tenant, because it might or did create a breach of the peace, seems to be exploded by the later authorities. (*Harvey v. Brydges*, 14 M. & W. 437.) The rule that the owner of personal property might take it wherever he could find it, if he did not commit a breach of the peace, or trespass on the close of another, is well established. But that the owner of personal property, or his servant, could justify the taking of such property forcibly from the possession of another who wrongfully retains it, and, being about to carry it away, refuses to give it up, has not been decided in any case that I have met

with, until the judgment of the Court of Common Pleas in England, in the case of *Blades v. Higgs* (10 C. B. N. S. 713). The Chief Justice (Earl) in giving judgment in that case says:—"The defendants have failed to adduce any case to shew where the justification was supported without an allegation to explain how the plaintiff took the property of the defendant, and became the holder thereof. But the principles of law are, in our judgment, decisive to shew that the plea is good, although that allegation is not made. * * It is decided that the owner of land, entitled to the possession, may enter thereon, and use sufficient force to remove a wrong-doer therefrom. In respect of land, as well as chattels, the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered, if force was justified; but in respect of land that argument has been overruled." He then quotes the following language of Parke, B., in *Harvey v. Brydges*:—"Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person, wrongfully holding possession of it against his will although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." And then concludes his judgment:—"In our opinion, all that is said of the right of property in land, applies in principle to a right of property in chattels, and supports the present justification. If the owner was compelled by law to seek redress by action, for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it."

Anthony v. Haneys (8 Bing. 186) is one of the cases where it is held necessary to shew the circumstances under which the property of the party who goes on the premises of

another to retake it, has been placed on those premises ; and the reference so often made to 3 Blackstone's Commentaries p. 4, is introduced, showing the necessity of making such a decision, to avoid breaches of the peace taking place. In argument in that case a distinction is taken between entering a man's house and his close. In *Burridge v. Nicholletts*, (6 H. & N. 391) Martin, Baron, says :—" I am not aware of any distinction between the inner door of a house or the wall or fence of a close."

The passage from Blackstone, on the recaption of personal property, after stating the impolicy of allowing the right, upon the ground that the public peace is a superior consideration to any one man's private property, and if any man was allowed to use force for the remedy of private injuries, social law must cease, the strong give law to the weak, &c., concludes:—" For these reasons it is provided that this natural right of recaption shall never be exerted when such execution must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use ; but I cannot justify breaking open a private stable, or enter on the grounds of a third person to take him, *except he be feloniously stolen*, but must have recourse to an action at law."

Taking this passage as it stands, the exception would clearly have justified the defendant going on to the premises of the plaintiff, not being a dwelling, to take the stolen goods, at the request of the owner, immediately after they were stolen.

Breaking into a dwelling house, the outer door being open, seems to be more a trespass than breaking into a close ; and the facts set up would in the view here presented have justified the owner of the goods, and consequently those acting in his aid and at his request, in breaking the close and taking the stolen property.

The arguments of counsel and dicta of Chief Justice Tindal, in the case of *Smith v. Shirley* (3 C.B. 142), referred to in the argument, in my view strongly support the defendants' plea. Talford (Sergeant), in arguing against the defendants' plea, stated " that the party taking upon himself

to act upon the suspicion, is not alleged to be a constable, or the party grieved; nor is it alleged that he acted at the request of the party grieved. * * * * There is no pretence or justification for breaking and entering the house. It is not alleged that the plaintiff or the stolen goods were there, or that the defendant believed them to be there." For the defendants it was argued, "if the plaintiff was actually in the house at the time, it was unnecessary to allege in the plea any ground of suspicion at all." The plea was held bad in that case, because it did not sufficiently show the purpose for which the house was entered. That purpose might have been either to search for the stolen property, or to arrest the plaintiff. That was a matter which ought not to be left in doubt.

There is this distinction between a private individual and a constable. In order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities; per Lord Tenterden, in *Beckwith v. Philbey* (6 B. & C. 633).

But it is not justifiable to enter land with cattle because it lies open to the highway, or to enter to search for goods stolen without reason of suspicion that they are there: Rol. Abr. 565, 1. 15; Comyn's Digest, "Trespass," 502.

In *Higgins v. Andrewes* (2 Roll. 55, 56), where the defendant justified on the ground that divers of his apricot, pear trees, &c., had been stolen, rooted up, and carried away by M. and B., and the common report was that they were carried to the house of the plaintiff, upon which the defendant came to the house of the plaintiff to search for them, and there found two of them and carried them away, upon demurrer, it was adjudged for the plaintiff, and a difference was taken between felony and trespass; "for if J. S. take my horse, and drive him to the land of J. D., it is not lawful for me to enter and take him; but if J. S. feloniously steal my horse and take him into the land of J. D., then I may justify my entry into the land to retake him."

Now from the plea in this case it clearly appears that the goods were stolen; that they were in the plaintiff's house (being found there); that they were taken by the defendants, at the request of the owner and in his aid, immediately after they were stolen, the outer door of the house being open.

We think, under the authorities, the facts set up in the plea well justified the entry of the defendants into the plaintiff's house, the outer door being open, to retake the stolen goods therefrom.

Judgment for defendants on demurrer.

CAMPBELL V. BAXTER.

Landlord and tenant—Proviso for determination of lease by notice—Forfeiture for non-payment of rent—Emblements—Right to bring ejectment without demand—Plea—Demurrer.

In an action by a tenant against his landlord for refusing to permit him to enter on the demised premises to take away the emblements, it appeared that the defendant gave notice, after the crops were sown, to terminate the lease according to a proviso contained in the instrument, and the lease was so terminated on the 20th March. After that day, and before the 30th March, defendant brought ejectment to recover possession of the demised premises. The defendant, by his plea, set up, that there was also a provision in the lease, that if any part of the rent of the premises should remain unpaid for fifteen days after it ought to be paid, *although no formal demand should be made thereof*, the landlord might re-enter and enjoy the premises as of his former estate; that a part of the rent was due and unpaid on the 15th March, and before he could recover in his action of ejectment or get possession, more than fifteen days had elapsed from that time, and he had a right to enter for such default, and he entered after the expiration of fifteen days on account of the said right of re-entry for non-payment of rent, as well as on account of the termination of the lease by notice; and by reason of plaintiff's default in payment of rent and defendant's entry, plaintiff forfeited his right to the emblements, and they became defendant's, as part of his reversionary estate in the land.

Held, on demurrer, plea bad: 1st, because there could be no forfeiture of the term under the provision for the nonpayment of rent, after the term was at an end, which was the case before the forfeiture became complete; 2nd, because the defendant, having by his notice terminated the lease and sued in ejectment to recover possession before there could have been any forfeiture for nonpayment of rent, could not afterwards be permitted to set up such non-payment as a forfeiture, as by the course he pursued he had deprived the plaintiff in the present action of the opportunity of obtaining relief in the former action from the effect of such forfeiture.

Held, also, that the defendant, under the proviso contained in the lease, as set forth in the plea, could have brought ejectment against the plaintiff in the present action for non-payment of rent, without making the formal demand which would otherwise have been requisite at common law, though there might have been sufficient distress on the premises to satisfy the arrears of rent.

The first count of the declaration stated :—And also for that whereas and before committing the grievances herein-after mentioned, the defendant by deed, bearing date the third day of April, in the year of our Lord one thousand eight hundred and sixty-one, had demised to the plaintiff a certain farm, being composed of the west half of lot number thirteen in the fifth concession of the township of Eldon, in the county of Victoria, to hold for the term of five years from the twentieth day of March, one thousand eight hundred and sixty-one, in which said deed was and is contained a proviso or stipulation, that if either the defendant or the plaintiff wished to bring the said term to an end prior to the expiration of the said five years, the party dissatisfied might do so by giving to the other party three months' notice in writing to that effect, before the expiration of any year mentioned in the lease; and whereas the plaintiff entered into the possession of the said lands under the said lease, and while so in possession and during the said term, and before any notice was given by either party for determining the same, according to the proviso aforesaid, and before the plaintiff had any notice or knowledge of the defendant's intention so to determine the same, the plaintiff sowed and put in a large quantity of fall wheat and other crops, in the autumn of the year of our Lord one thousand eight hundred and sixty-two, to be harvested, cut and gathered, the following year, of which the defendant had due notice; and whereas, after the said wheat and other crops were so sowed as aforesaid, the defendant, well knowing the premises, availed himself of the provision for determining the lease hereinbefore referred to, and by writing, dated the ninth day of December, in the year of our Lord one thousand eight hundred and sixty-two, notified the plaintiff that the said lease would be determined on the twentieth day of March then next, to wit, in the year of our Lord one thousand eight hundred and sixty-three, and demanded possession of the same accordingly; and whereas, afterward, and while the said wheat and crops were growing, and before they were mature and fit for harvesting, the defendant, in pursuance of the proviso aforesaid and the said notice and demand, accordingly by action ejected and

put out the plaintiff from the said lands and premises, and took possession of the same himself, and thereupon it became and was the duty of the defendant to allow and permit him, as soon as the said wheat and crops were ripe, to enter into possession of the said lands for the purpose of harvesting the same, and to cut and carry away the said wheat and crops, and the defendant was requested by the plaintiff to permit and suffer him to do accordingly; yet the defendant, not regarding his duty in that behalf, but intending to injure the said plaintiff, did not nor would, upon such request, when the said wheat and crops were so ripe and fit for harvesting, permit or suffer the plaintiff to enter into the said land for the purpose aforesaid, or to cut, harvest or take away the same, or any part thereof, but wholly refused so to do; and the defendant himself cut and carried away the said wheat and crops, and afterwards converted and disposed of the same to his own use, whereby the plaintiff lost and was deprived of his said wheat and crops.

Plea. And for a ninth plea as to the fourth count of the said declaration, the defendant says, that in the said indenture of lease in the said fourth count mentioned, there was and is contained, in addition to the provision for terminating the said lease in said fourth count mentioned, a provision, and it was thereby expressly agreed by and between the plaintiff and defendant, that if the rent thereby reserved, or any part thereof, should be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand should be made thereof, it should be lawful for the defendant at any time thereafter, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, re-possess and enjoy, as of his former estate. And the defendant further avers that the said premises were in and by the said indenture of lease demised to the plaintiff at a certain rent or sum, to wit, the sum of one hundred and sixty dollars a year, payable by two half-yearly payments, on the fifteenth day of October and the fifteenth day of March, in each and every year during the said term in the said fourth count mentioned. And the defendant further avers that on the fifteenth day of March, in the year of our

Lord one thousand eight hundred and sixty-three, and before the expiration of the time named in the said notice in the said fourth count mentioned, terminating the said demise, there became and was due from the plaintiff to the defendant the sum of eighty dollars, for and on account of one half-yearly payment of the said rent, and a large portion, to wit, the sum of sixty-eight dollars, part of the said sum of eighty dollars so due, remained and continued due and unpaid from the plaintiff to the defendant, and hath ever since continued and still is due and in arrear. And the defendant saith, that after the said rent had so fallen due and in arrear, to wit, on the fifteenth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and before the expiration of fifteen days from the day when the same became so in arrear, the said action of ejectment was commenced; and that before he, the defendant, could obtain judgment in the said action, or enter into possession of the said premises by virtue thereof, more than fifteen days from the day when the said rent had fallen in arrear as aforesaid had elapsed, and he, the defendant, when he recovered judgment in the said action of ejectment was entitled to enter in and upon the said premises, because the said sixty-eight dollars, portion of the said rent so due, had been due and in arrear for the space of more than fifteen days. And the defendant entered on, to wit, the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and sixty-three, after the expiration of fifteen days from the day on which the said rent became due, into the said demised premises in the said fourth count mentioned, on account of the said right of re-entry by reason of the non-payment of the said rent, as well as for the cause in the said fourth count mentioned. And by reason of the plaintiff's default in the payment of the said rent, and the entry of the defendant into the said demised premises as aforesaid, the plaintiff lost and forfeited all right to the said wheat and crops in the said fourth count mentioned, the same being then growing on the said demised premises as in the declaration mentioned, and not cut or harvested, and being still attached to the soil and freehold, and the same wheat and crops then

became and were the defendants, as part of his reversionary estate and interest in the said land.

Demurrer. 1. That the said ninth plea confesses the plaintiff's cause of action in said fourth count set out, but does not avoid the same by any legal or sufficient answer.

2. That it appears that the plaintiff was ejected by action from the demised premises, before the wheat and crops therein mentioned were ripe, under a proviso in the lease for determining the tenancy by notice, and not by virtue of the proviso in the said lease for re-entry for non-payment of rent; and the mere fact of the rent subsequently accruing dues does not give the defendant any sufficient title to deprive the plaintiff of his crops in the ground, which he had the right to harvest and take away as emblements.

3. That it is not alleged in said plea that the defendant distrained the said crops for the said rent alleged to have accrued, or sold and applied the same in or towards payment of said rent; but, on the contrary, it is admitted, as alleged in the said fourth count, that the defendant converted and disposed of the plaintiff's said crops to his own use.

4. That it appears from said ninth plea that the action of ejectment therein mentioned was commenced before any right of re-entry for non-payment of rent had arisen, (if not before the alleged half-year's rent actually accrued due); and even if the plaintiff had then paid the said half-year's rent, it would not have restored the term which the defendant had terminated by his notice, or have enabled him, the plaintiff, to retain possession of the said land till the said wheat and crops were ripe and ready for harvesting.

5. That the defendant had no right to take possession of the said land and expel the plaintiff under the proviso for re-entry for non-payment of said rent, without an action of ejectment being first brought for such forfeiture; and it appears that no such action was brought, but that the action was brought on the notice previously given determining the tenancy.

6. That it is not alleged that there was no sufficient distress on the said premises, countervailing the alleged half-year's arrears of rent; nor is it stated that any demand of

said rent whatever was made by the defendant before re-entry by him, or at any time whatever.

Harrison, for the demurrer, cited *Colesworth et al. v. Spokes*, 10 C. B. N. S. 103; *Cavanagh v. Gudge et al.*, 7 M. & G. 316; 1 D. & L. 928; Imp. Stat. 4 Geo. II. ch. 28, s. 2; Con. Stats. U. C. ch. 27, s. 51; Woodfall's L. & T. 7th ed. 268; *Price v. Woorwood*, 28 L. J. Ex. 329; 1 Chitty's Arch. Pr., 9th ed., 951; *Johns v. Whitley*, 3 Wilson, 127.

M. C. Cameron, Q. C., contra, cited *Davies et al. v. Eytton*, 7 Bing. 154; *Sir Nicholas Simonds*, 2 Rolle's Rs. 468.

RICHARDS, C. J., delivered the judgment of the Court.

When a landlord at common law claimed a forfeiture for non-payment of rent reserved in a lease, which gave a right of re-entry for non-payment of the rent, he was obliged to pursue the remedy with great strictness by making a demand of the rent, the precise sum due, upon the day when it was payable, a convenient time before sunset, and upon the land: Crabb's Law of Real Property, s. 251; Wm. Saunders, vol. i p. 286, b. N. 16. If he failed in any one of these requisites, he could not enforce the forfeiture at common law. But the statute of 4 Geo. II. ch. 28, provided that when there was half a year's rent in arrear and no distress on the premises, when there was a right of re-entry contained in the lease, the landlord might recover possession in the mode pointed out by that statute, without any formal demand of the rent. And even at common law, which the lease gave the right of re-entry to the landlord for non-payment of rent, "though no formal or legal demand should be made for payment thereof," the landlord might maintain ejectment without any entry or demand of the rent: *Doe Harris v. Masters* (2 B. & C. 490).

I think, therefore, the defendant, under the provision of the lease as set forth in the ninth plea, could have brought ejectment against the plaintiff for non-payment of the rent without making the formal demand which would otherwise have been necessary at common law, though there might have been sufficient distress on the premises to satisfy the arrears of rent.

If the defendant had applied to the court for relief from the forfeiture, and had brought the arrears of rent into court and paid the costs, the court probably would have granted relief, as they were in the practice of doing before the passing of the statute of George II.; at all events a court of equity would without doubt have given relief; *Doe Wyatt v. Byron et al* (1 C. B. 623).

Under the notice and demand in the declaration and the conditions mentioned of the lease, the term was at an end on the 20th March, 1863. The half-years's rent became due on the 15th March, and the forfeiture for non-payment of the rent would not have been complete until the 30th March; but the term was at an end, by virtue of the notice and demand on the 20th; so that after that, it seems to me, there was nothing to forfeit. When the further fact appears from the plea, that the action to recover possession was actually commenced by the plaintiff before the 30th March, I fail to see how the defendant shows by anything in that plea that the term was ended by the default to pay the rent, which default could not have put an end to the term until the 30th March, some days after. By bringing his action the now defendant affirmed the term was then at an end, and the now plaintiff could not have successfully defended that action, before the defendant had taken the proper steps to avoid the lease by his own act. If the defendant had delayed bringing his action until the time for the forfeiture to accrue under the provision for the non-payment of the rent had elapsed, the now plaintiff might have taken steps to be relieved from the effect of the forfeiture; and if the now defendant had then set up that the term was ended by the notice, there could have been no relief as to that; but even then the now defendant might have been prevented from going on for the forfeiture, though he would not on the ground that the term was at an end under the notice. The defendant fails as to the ninth plea, in my judgment, on two grounds: first, that there could be no forfeiture of the term under the provision for the non-payment of rent when the term was at an end, which was the case before the forfeiture became complete; and secondly, because the defendant,

having by his notice terminated the lease, and sued in ejectment to recover possession before there could have been any forfeiture for non-payment of the rent, cannot now be permitted to set up such non-payment as a forfeiture, as he by the course he pursued deprived the now plaintiff of the opportunity of obtaining relief from the effect of that forfeiture. *Johns v. Whittey* (3 Wilson, 127) is an express authority on the first ground. There the lease expired by the death of a person for whose life the tenant held. The plaintiff entered, and defendant, the tenant, afterwards came on the leased premises and took away the emblements. the plaintiff brought trespass against him, and contended that there was a clause in the lease that the premises were not to be let to tillage; that they were so let to tillage before the end of the term, and, there having been a clause in the lease giving a right of re-entry for such condition broken, he (the plaintiff) was entitled to the emblements. The court held that the proviso for re-entry only operated during the continuance of the lease; when that was determined, the proviso had vanished and was gone: that the plaintiff, never having been in possession by right of re-entry for condition broken, could have no advantage thereof; that the defendant, who ploughed and sowed the land, had in law and justice a right to reap and take the emblements."

In Chitty's Arch., 9th ed., 951, 11th ed. 1005, it is stated, "That when a person entitled to land has a right of entry, *except for a forfeiture for non-payment of rent*, he may in a peaceable manner * * * enter and take possession." I have not found any authority for the exception, but suppose the author must refer to the remedy under the statute, where the landlord may eject when no sufficient distress can be found on the premises, and six months' rent is in arrear.

Judgment for plaintiff on demurrer.

MUNSIE v. MCKINLEY ET AL.

Division Court—Jurisdiction—Interpleader—Title to Land—Prohibition.

The judge of a Division Court may, notwithstanding Con. Stats. U. C. ch. 19, sec. 54, subsec. 4, entertain an *interpleader* application to try the question of property in goods, even though the enquiry may involve the title to land. The judge *himself* must decide such application *without the aid of the jury*.

In Trinity Term last, *O'Connor* had obtained a rule, calling upon the plaintiff and John Boyd, Esq., junior judge of the county court of the united counties of York and Peel, to shew cause why a writ of prohibition should not issue to prohibit the said John Boyd, or other person authorized to hold the Sixth Division Court of the said united counties, from proceeding to try and determine, or from further proceeding in a certain interpleader summons issued out of the last mentioned court, whereby one Francis McKinley and the said William Munsie were called before the said division court, in order that the claim of the said Francis McKinley to certain property seized by one of the bailiffs of the said division court, under process issued by the said William Munsie, out of the said Division Court, against the goods of William McKinley and Sidney McKinley, might be adjudicated upon, upon the ground that the title to corporeal hereditaments came in question, and the said court had no jurisdiction; and why the sum of £20 18s. 2d., which the said Francis McKinley had paid into the said division court should not be refunded to him.

The affidavits shewed that the property in dispute was the crops growing on the east half of the lot number three, in the tenth concession of the township of King, which one Pottage, the bailiff, had seized in the month of June last, as the property of William McKinley and Sidney McKinley; that William McKinley had conveyed the said land to Francis McKinley for a good and valuable consideration; and that the crops belonged to the said Francis McKinley, who had been in the continuous possession of the land from the date of the conveyance; that after the seizure Francis McKinley gave notice of his claim to the bailiff, who, thereupon, caused an interpleader summons to issue, calling upon Francis McKinley to appear, and prove and sustain his right to the said property; that on the first day of July last he

did appear before the said John Boyd, Esquire, the said judge, and, by *Mr. O'Brien*, who acted for him, objected to the jurisdiction of the court, on the ground that the title to land came in question; that a jury having been summoned at the instance of William Munsie was also objected to, on the ground that there was no provision of law for juries on such issue; that *Mr. Boyd* overruled these objections, and the case went to the jury, who found for Munsie; that afterwards a new trial was granted, on condition that the debt and costs should be paid into court, which was done.

During the present term, *Bull*, for Munsie and Boyd, shewed cause. He filed affidavits denying that the jurisdiction had been questioned, and cited *Denton v. Marshall*, 7 L. T. N. S. 689; *Walsh v. Ionides*, 22 L. J. Q. B. 137; *The Queen v. Doty*, 13 U. C. Q. B. 398; *Richards v. Maidenhead Local Board of Health*, 27 L. J. Mag. Ca. 73; *Joseph v. Henery*, 19 L. J. Q. B. 369.

O'Connor supported the rule, and contended that in order to sustain his claim, Munsie attached the conveyance to Francis McKinley, so as to show that the title to the land on which the crops were growing was still in William McKinley, and thus brought the title to the land in question; and that instead of deciding himself on the interpleader matter, the judge had summoned and sworn a jury, for which he had no authority. He cited *Marsden v. Wardle*, 3 Ell. & Bl. 695; *Thompson v. Ingham*, 14 Q. B. 710; *Kerken v. Kerken*, 3 E. & B. 399; Con. Stats. U. C. ch. 19, sec. 54, subsec. 4, sec. 55, subsec. 2, secs. 61, 175.

Hector Cameron, (*amicus curiæ*), cited *Trainor v. Holcomb*, 7 U. C. Q. B. 548.

J. WILSON, J., delivered the judgment of the court.

The 4th subsec. of section 54 of the "Act respecting the Division Courts" provides, that these courts shall not have jurisdiction in actions in which the right or title to any corporeal or incorporeal hereditaments comes in question. But the 175th section provides, that "in case a claim be made to or in respect of any goods or chattels, property or security, taken in execution, or attached under the process of any division court, or in respect of the proceeds or value thereof,

by any landlord for rent, or by any person not being the party against whom such process issued, then, subject to the provisions of the 'Act respecting Absconding Debtors,' the clerk of the court, upon application of the officer, charged with the execution of such process, may, whether before or after the action has been brought against such officer, issue a summons calling before the court out of which such process issued, or before the court holden for the division in which the seizure under such process was made, as well the party who issued such process, as the party making such claim; and the county judge, having jurisdiction in such division court, shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceeding, as to him seems fit; and such order shall be enforced in like manner as an order made by any suit brought in such division court, and shall be final and conclusive between the parties."

In this clause is embodied this important provision," that thereupon" (that is, upon the bringing of the party who issued the execution and the party claiming the goods before the court), "any action which has been brought in any of Her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, shall be stayed; and the court in which such action may be brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels or property or security were so taken in execution, or upon attachment, by order the party bringing such action to pay the cost of all proceedings had upon such action after the issuing of such summons out of the division court."

By the statute the jurisdiction is limited, first, in all personal action where the debts or damages claimed do not exceed forty dollars, and, secondly, to all claims and demands of debts, accounts, of breach of contract, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars.

If an action were brought in a division court to try the right or title to any corporeal or incorporeal hereditaments, or if a personal action, or an action for debt, account or breach of contract, or covenant or money demand, had been

brought clearly beyond its jurisdiction, and attempted to be maintained, prohibition would have been granted. But in an interpleader matter, which is collateral to the action, is the jurisdiction limited? A quantity of goods, a single chattel, a piano or a horse, in value much exceeding one hundred dollars, may be the subject of dispute. Is there any doubt of the jurisdiction of the division court judges to try whose they are, in an interpleader matter? But the jurisdiction is limited in regard to value to forty dollars in matters of tort, which a seizure of the goods of B. for the goods of A. must necessarily be. The question of whose the land is, may arise on a claim of landlord for rent from the bailiff, but the statute gives express jurisdiction; or it may arise, as in the case before us, on the question of whose the crops are; but it is a collateral question, arising in a matter collateral to the action. Does it, therefore, follow the court has no jurisdiction? There is no express limitation of jurisdiction in the act in reference to interpleader matters; and we may gather the intention of the Legislature that none was intended from the fact, that to enable a bailiff to make one hundred dollars and the costs of the suit, goods to a much greater value must necessarily be seized. To enable the judge to adjudicate upon claims for rent, might involve the question of title, for two might claim for rent adversely to each other. The clause quoted, which stays proceedings in any court for the alleged wrong in seizing, implies the right in the judge to adjudicate upon rights to property and securities exceeding in value one hundred dollars, and contains no provision to prevent the judge from proceeding in case the inquiry involves the title to lands.

We, therefore, think the judge may, in interpleader, try whose the crops are, although the inquiry may bring the title to the land in question.

In regard to the question as to whether the judge alone is to adjudicate upon the claim in interpleader, or may summon a jury, or whether either party may require a jury, we think the direction of the statutes are plain: "The *county judge* having jurisdiction in such division court *shall adjudicate* upon the claim."

A new trial has been granted by the Division Court Judge. We cannot presume he will act contrary to the express directions of the statute, and throw off the responsibility cast upon himself. But can we grant a prohibition on the statement that he has once improperly sworn a jury, and on the suggestion that he may do so again? We think not; and no doubt the opinion of the court in this respect will prevent the irregularity in future. The rule will be discharged.

Rule discharged without costs.

IN THE MATTER OF MALCOLM OGILVIE MCGREGOR, AN
ARTICLED CLERK.

Attorney's clerk—Discharge from articles—Practice.

A clerk articulated to an attorney, who, during the continuance of the articles, absconds, will be discharged from his articles.

Delivery of a copy of the rule *nisi* to the town agent of the attorney, and leaving copies at his last place of residence and at his office, held sufficient evidence.

S. Richards, Q. C., obtained a rule to shew cause why an articulated clerk, named McGregor, should not be discharged from his articles, by which he was bound to an attorney of this court, who resided at the village of Elora.

It appeared by affidavit, that on the 16th day of March, 1860, McGregor had articulated himself to one Gilkison, a practising attorney; and in this and other affidavits it was shewn, that in September, 1864, he had sold his furniture and effects, and left this province for parts unknown, without any intention of returning.

The rule was moved absolute, on affidavits shewing that the rule *nisi* had been served by delivering one copy of it to the town agent of Gilkison, and by leaving another copy at his last place of residence, and also at his office.

Richards, Q. C., moved the rule absolute, citing *Con. Stats. U. C. ch. 35, sec. 15*; 1 *Arch. Prac.* last ed. 40; *Ex parte Wilkinson*, 9 Dowl. 320; *Ex parte Hancock*, 2 Dowl. N. S. 54; *Ex parte Carnley*, 2 Dowl. N. S. 945.

No cause was shewn.

J. WILSON, J., delivered the judgment of the court.

The Imperial Stat. 6 & 7 Vic. ch. 73, contains clauses substantially the same as the 14 & 15 secs. of the Con. Stats. U. C. ch. 35.

Before the passing of the Imperial statute, the Court of Queen's Bench had discharged the articles in the case of *Wilkinson* (9 Dowl. 320), which was one precisely like this. Neither that statute, nor ours, provides in words for the present case, but they do provide for cases where the attorney discontinues or leaves off practice.

In this case, the affidavits shew that the attorney has virtually left off practice, and has absconded. The statute provides for the former, the practice for the latter.

The service of the rule being sufficient, we think it ought to be made absolute.

Rule absolute accordingly.

CRAWFORD V. CURRAGH ET AL.

Will—Attestation—Statute of Frauds—Con. Stats. U. C. ch. 82, sec. 13—Evidence

Con. Stats. U. C. c. 82, s. 13, does not repeal, but merely extends the Statute of Frauds as to the execution of wills; and a will subscribed by the witnesses, in accordance with the provisions of either act, is sufficiently attested.

Held, therefore, in this case, that a will subscribed by *two* witnesses, in the presence of *the testator*, though not in the presence of *each other*, was well executed.

Held, also, that although there was no positive evidence that one of the witnesses had in fact subscribed in the presence of the testator, the evidence under the circumstances attending the execution of the will, and the fact of possession having for upwards of sixteen years gone along with it, coupled with proof of the death of the witness, would warrant a jury in finding, and the court, under the power given it to draw inferences of fact, in inferring, that the witness had signed in the presence of the devisor; and that the will was therefore duly executed.

This was an action of ejectment, in which there was a verdict for the plaintiff, subject to the opinion of the court upon the facts stated.

The question was, whether the will of Joseph Boyd, made in 1846, under which Curragh, the defendant, claimed, was duly executed; the plaintiffs, in right of the plaintiff Margaret, as heiress-at-law to her brother, Joseph Boyd, claiming adversely to the will.

The evidence of Wm Gidson, one of the witnesses to the will was, that Samuel Pollard, the other witness, was dead.

He said: "One morning, when I called [on testator], old Mrs. Boyd, the mother, said, that Joseph was wasting away fast and had settled his affairs. Mary [one of the deceased's sisters] went out and she saw Pollard come in, and they went into the room where Joseph was. Pollard had the will in his hand. He said [to witness], 'Will you witness the will of Joseph Boyd?' Joseph was sitting in an arm-chair, within four or five feet, and he heard what was said. He [Pollard] said he had witnessed it before, and he said he understood it required another witness. He then opened it, and showed it to Joseph Boyd, and said, 'This is your will, Mr. Boyd;' and Boyd nodded assent, that it was. I then signed my name as witness, in presence of John Boyd. I think Pollard folded it up and took charge of it. * * * I did not see Samuel Pollard sign his name to it. I did not see Joseph Boyd sign his name. I did not hear him speak about it; he only nodded his head in assent to what Pollard said. I don't know when the will was signed by Joseph, or when Pollard signed his name there."

The signature of Joseph Boyd was proved, and also that he knew quite well what Pollard said to him when he asked him about the will.

The case, then, was this, so far as the positive proof extended,—that Joseph Boyd, if he did not sign this alleged will in the presence of Pollard, acknowledged it at any rate to him, and that Pollard subscribed it as a witness; and that at a future time Joseph Boyd acknowledged the will in the presence of Pollard and Gibson, both being present at the same time; and that Gibson then subscribed his name as a witness to the will, in the presence of the testator and of Pollard.

Boyd for the plaintiff. The will is invalid, because not duly subscribed by the witnesses in the presence of each other, according to the U. C. Con. Act, ch 82, sec. 13, which imperatively requires this. But even if a will can be executed, as under the former law, only in the presence of two instead of three witnesses, then it does not appear that the will was described by Pollard in the presence of the testator. *Ellis v. Smith*, 1 Ves. jun. 11; *Risley v. Temple*, Skinner, 106; *Jarman on Wills*, 3rd ed. 72, 77, ch. 6, sec. 1; *Moore*

v. *King*, 3 Curties ; 243 ; *Payne v. Scriven*, 1 Rob. 772 ; *Re Trevanion*, 2 Rob. 311 ; *Charleton v Hindmarsh*, 1 Swa. & Trist. 433.

MacLennan for defendant. Jarman on Wills (2nd ed. 67) shows that this will was duly executed according to the requirements of the Statute of Frauds, excepting as to the number of three witnesses, which has been altered in this respect by our statute. Our statute has simply reduced the number of witnesses from three to two, and has not introduced any other or greater ceremony than prevailed before its passing. The object of the act was to dispense with needless ceremonies in such instruments, which only tended to frustrate the intention of devisors. The acknowledgment by the testator in presence of Pollard, and afterwards in presence of both Pollard and Gibson at the one time, was a due execution by the testator, and a due subscription and attestation by the witnesses, although they added their names as such witnesses at different times, and Gibson did not see Pollard subscribe at all. *The British Museum v. White*, 6 Bing. 310. Our own statute was fully complied with ; because it does not require that the witness shall subscribe in the presence of the testator (though the evidence, fairly construed, shows that this too was done) ; it only declares that "it shall be sufficient" if the witness subscribe in the presence of each other.

A. WILSON, J., delivered the judgment of the court.

The Statute of Frauds, as to the execution of wills, provided, "That all devises and bequests of any lands or tenements devisable, * * * shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

Under this state of the law it was not necessary the testator should actually sign his name in the presence of the witness ; an acknowledgment by him of his signature in their presence was sufficient. The case in 6 Bing. 310, quoted in the argument, and many other cases, establish this

So also it was long since held and continued to be the law in England until the Wills Act of 1837 was passed, and it is still the law here, that the acknowledgment so made need not be made by the testator to all the witnesses at the one time or in presence of each other, but that this may be done at different times, and that the witnesses may subscribe their names at different times, and not in the presence of each other. *Jones v. Lake* (2 Atkins, 176, note); *Ellis v. Smith* (1 Ves. Jun. 11). The witnesses were, however, according to the plain words of the statute, always required to subscribe in the presence of the deviser.

By our present law it is provided that "Any will affecting land, executed after the 6th March, 1834, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator."

One part of the controversy here is, whether the last clause of "this action, and it shall be sufficient," &c., is an enactment that the witnesses *shall* subscribe their names in presence of each other, or is a mere declaration that if the witnesses do not subscribe their names in presence of the testator, as under the prior law, the will shall not nevertheless be void, but that it shall be sufficient if the witnesses do subscribe in the presence of one another?

The statute of Charles has not, in express terms, been repealed as to wills; and, so far as it has not been repealed by enactments inconsistent with its maintenance in part or in whole, there is no reason why it may not be considered as still an active law here. Now, under that statute it was a positive direction that the witnesses should subscribe and attest the will *in the presence of the deviser*, otherwise the will should be utterly void and of none effect.

There is nothing inconsistent in our amended law and this provision subsisting together: on the contrary, it rather seems that the legislature intended that this part of the old law should yet continue to be the law; leaving it, however, to the devisor to pursue either the new law or the old law

according to circumstances or his own convenience—that is, either to see the witnesses subscribe the will, or if he did not, that they should see each other subscribe it. And, therefore, we are of opinion that, under the provision, “it shall be *sufficient* if such witnesses subscribe their names in presence of each other, *although their names may not be subscribed in presence of the testator*,” the law of this province does not prevent a will being still subscribed by the witnesses in the presence of the devisor, as it might have been before the passing of the late act, under the statute of Charles; and that the new provision has extended the old law, by making it *sufficient* if the witnesses see each other subscribe the will, although the devisor may not have seen them.

There may, perhaps, be other reasons for treating the act of Charles as not wholly rescinded as to wills in this province. The primary object of the amended act was to substitute two witnesses in the place of three. The new act says nothing of the will being *in writing*, although that would be implied from the context. Nor does it say that the will shall be executed “by the party devising,” although that may also, perhaps, be inferred. Nor does it say that the will may be executed “by some other person in his presence, and by his express direction,” which, perhaps, cannot be implied. The act, therefore, is not a complete law in itself, and does not profess to be so, but assumes all these provisions to be still subsisting; otherwise the legislature in professing to remove unnecessary difficulties in the way of such instruments would have taken care not needlessly, in these respects, to have added to them.

The Imperial Wills Act of 1 Vic. cap. 26, expressly repeals all former acts relating to wills, and re-enacts anew all the above provisions not noticed in our act of 1834, and some others, which it would be very proper for us to follow.

The other point in controversy is, that although this will might have been executed according to the formalities of the old law, under which the witnesses may subscribe in the presence of the testator; yet the evidence does not shew that Pollard did subscribe his name in the presence of the testator. The evidence is not very satisfactory as to this;

but it arises from the acknowledgment of the will by the testator having been made at first only to and in the presence of Pollard, and the death of Pollard, in consequence of which the necessary explanation as to what really did take place, cannot now be given.

The evidence, such as it is, is this:—While Gibson, one of the two witnesses, was at the testator's house, Pollard, the other witness, came to the house also. "Pollard had the will in his hand. He said [to Gibson] will you witness the will of Joseph Boyd? Joseph was sitting in an arm chair, within four or five feet, and he heard what was said. He [Pollard] said he had witnessed it before, and he said he understood it required another witness. He then opened it and showed it to Joseph Boyd, and said, 'this is your will, Mr. Boyd,' and Boyd nodded assent that it was. I [Gibson] then signed my name as witness in presence of Joseph Boyd. I think Pollard folded it up, and took charge of it. I did not see Pollard sign his name to it."

The attestation clause of the will then states that the testator set his hand and seal "in presence of us, the subscribers, Samuel Pollard and William Gibson."

The court is at liberty "to draw inferences of fact;" and the question is, whether we can infer as a fact that Pollard did subscribe as a witness in "the presence of the testator." The facts are consistent with the conclusion either that he did or did not. The only other additional fact is, that the land since the testator's death, about the end of 1846, has been "in the possession of his mother and sister even since. Mary Boyd was the last person who died in possession." And so far the possession has been according to the will, which is a very important fact in favour of its validity, and quite sufficient to have gone to the jury, with the other circumstances, as some evidence of its due execution.

The case of *Doe d. Davies v. Davies* (9 Q. B. 648) fully sustains this. In that case the will was made in 1828. No evidence was given of the handwriting of the deviser, not that he had authorized any one to sign for him. Two out of the three attesting witnesses were dead. The handwriting of these two was proved. The third witness had signed with a mark only, and could not be identified. A witness of that

name was produced who was supposed to be this witness ; but he was in extreme old age, and had no memory on the subject. The name so signed by a mark was between the names of the other witnesses. This was the only evidence in favor of the genuineness of the third signature. The will had not been disputed for 16 years ; and the judge left these facts to the jury as presumptions that the will had been properly attested, and the jury found in favor of it ; and the court afterwards confirmed this direction and finding. The court said :—“It has been decided that direct evidence of all the requisites of the 29 Car. II. ch. 3, sec. 5, is not indispensable to prove the validity of a will, and that the attestation in the presence of the testator may be inferred from circumstances.”

The case there referred to of *Croft v. Pawlet* (Str. 1109) is also very applicable to the present case ; for there, as here, the attestation clause of the will was, “Signed, &c., as and for his last will, in the presence of us, A. B. C. ;” and the court, on its being proved that all the witnesses were dead, and that the signatures of the witnesses were genuine, held, that there was evidence to go to the jury of “a compliance with all circumstances,” although it was objected that the hands of the witnesses could only stand “as to the facts they had subscribed to, and signing in the presence of the testator was not one.”

Hands v. James, in 2 Com. Rep. 531, referred to also in the above case in 9 Q. B., is exactly to the same point. See also *In the goods of Holgate* (5 Jur. N. S. 251) ; *In the goods of Thomas* (5 Jur. N. S. 104) ; *Andrews v. Motley* (12 C. B. N. S. 526).

We are of opinion, then, that, although the will was not subscribed by the witnesses in the presence of each other, it was not, nevertheless, void for that cause, but that a subscription by them in the presence of the devisor was, if it be established, a sufficient subscription according to our law.

We are, also, further of opinion, that, although there was no direct evidence of Pollard having subscribed his name in presence of the devisor, there was evidence under the circumstances attending the execution of the will, and of the possession having, for so many years, gone along with it ;

and no proof of Pollard's death, who could alone have explained the fact, sufficient to have been submitted to the jury, and to have warranted them in finding in favor of "a compliance with all circumstances," as to the due execution of the will; and that, as we have the power to draw inferences of fact, we are justified under this evidence, and on the authorities before mentioned, in inferring that Pollard did subscribe the will in the presence of the devisor; and, therefore that the will was duly executed, in all respects, for the purpose of passing real estate.

The *postea* should, therefore, be delivered to the defendant.

Postea to the defendant accordingly

GOTTWALLS V. MULHOLLAND.

Sale or conveyance by an insolvent—Bona fides of transfer—Con. Stats. U. C., ch. 26, sec. 18—13 Elizabeth, ch. 5, sec. 2.

A sale or conveyance of property made by an insolvent, though not in the ordinary course of trade, without intent to defeat or delay creditors, or to give a preference, is valid; for the *intent* with which it was made must govern.

The last clause of sec. 18, ch. 29, Con. Stats. U. C., does not avoid all conveyances by an insolvent which are not for the benefit of creditors, or which are not made in the ordinary course of trade to innocent purchasers; it merely excepts the cases therein mentioned from the operation of the antecedent portion of the section, but does not invalidate other transactions within the objects of the act.

In this case the execution debtors on the eve of insolvency, and after service upon them of the writ at the suit of the defendants (the execution creditors), sold their stock in trade to the plaintiff with the knowledge by the latter that they had been so sued, taking from plaintiff promissory notes payable in one, two, three, and four years, for the purpose of dividing them ratably among their creditors. These notes were accordingly offered to and accepted by the several creditors of the debtors, with the exception of the defendants, who rejected them.

Held, that the jury were properly directed to support the sale to plaintiff, if they found that it had been made *bona fide* with intent to transfer the property to plaintiff, and was not colourable for the purpose of protecting it for the debtor, even though the effect of such sale might be to prevent the defendants from seizing the property under their execution.

Held, also, that save as to the provisions in the Provincial Statute against preferring one creditor to another, the Stat. 13 Eliz., ch. 5, sec. 2, and it are substantially alike in their general provisions. *Wood v. Dixie* (7 Q. B. 892) was a case of preferring one creditor to another, and does not decide that the intent to defeat creditors is not enquirable into even when the sale was for good consideration and intended to pass the property; but *Seemle*, it would not be sustained here under the Provincial Act, which prohibits preferences.

Per J. Wilson, J., that the jury should have been further directed, that if the vendors were at the time of sale insolvent, or knew themselves to be

on the eve of insolvency, and made the sale with intent to defeat or delay their creditors, or to give one or more a preference, the sale was void, unless it was made in the ordinary course of trade to an innocent purchaser; that a sale may be *bona fide* as opposed to colourable, and yet void by Con. Stats. U. C., ch. 26, sec. 18, if the intent was to contravene its provisions; and that the question for the jury is, 'was it made with that intent?'

This was an *inderpleader* issue to try whether certain goods, on the 29th April, 1863, sized in execution by the sheriff of the county of Grey, under a *fi. fa.* issue out of this court, upon a judgment recovered by the now defendants as plaintiffs against Luscombe and others, were or any part of them was at the time of the seizure the property of the now plaintiff as against the now defendants.

The trial took place at the fall assizes of 1863 held at Owen Sound, before the Chief Justice of this Court, when a verdict was rendered for the plaintiff.

The evidence showed, that the execution debtors commenced business on the 1st, October, 1862, and sold out in March, 1863, to the plaintiff, because he had made an offer to buy them out, and because they were in difficulties at the time. Stock was then taken, and put down at cost price. The plaintiff gave his notes, although amounting to \$1,052, at one, two, three and four years, without interest, in equal payments. The goods were nearly all a winter stock, and would have had to be held over till the following winter, which was the reason for so long a credit being given. The debtors had four creditors in Montreal, whose claims were \$1,640. The defendants were also creditors, their claim being \$413. The notes were offered to the creditors, all of whom, with the exception of the defendants, agreed to take them; the other creditors were perfectly satisfied, and thought the best had been done. Defendants had the debtors' notes endorsed by Yeomans; and the debtors had paid Yeomans, thinking he held the notes. Defendants said, if they could not get the amount out of Yeomans, they would share with the other creditors. Yeomans' failure brought the debtors into difficulty. The plaintiff is well worth double the amount of his notes. Defendants served their writ on the debtors before they sold out. The plaintiff is a brother-in-law of one of the debtors. The creditors were not consulted as to the sale, so that all might have an equal

share. Plaintiff was aware of debtors' being sued by defendants before he bought.

The learned Chief Justice told the jury that if they were satisfied the sale to the plaintiff was *bona fide* with intent to transfer the property to the plaintiff, and was not colourable for the purpose of holding the property for the debtors' benefit, to find for the plaintiff, although the effect may have been to prevent the defendants, when they got their judgment, from taking the stock in execution for their claim; but if it were not a *bona fide* transaction, to find for the defendants. He also stated that the facts urged in favor of the sale were, that the plaintiff had agreed to pay the cost price for the goods; that the notes given were equally distributed among the creditors, and the defendant were offered a share with the other creditors but refused to take it; and that the facts against the sale were, that the debtors were on the event of insolvency; the period for payment of the notes were long; and the notes were without interest; one of the debtors still continued to dispose of the goods; the business was carried on at the same place; there was a relationship between the plaintiff and one of the debtors; and that they ought to have made a general assignment for the benefit of all their creditors.

The counsel for the defendant objected to the charge, and insisted that the jury should be told that if they found the sellers were in insolvent circumstances, and that the sale was not made in the ordinary course of business, it was void under the statute; and that the *bona fides* of the transaction made no difference. He read the observations of Jarvis, C. J., in *Smith v. Cannan* (2 El. & Bl. 43), in support of his view.

The Chief Justice observed that he did not think the language of the statute differed substantially from the statute of Elizabeth, and he stated his views generally according to the decision of *Wood v. Dixie* (7 Q. B. 892),

The jury found that the sale was made *bona fide* to dispose of the property to the defendant, to enable the debtor to realize from it and apply the proceeds among their creditors equally.

Palmer, in Michaelmas term, 1863, obtained a rule *nisi*

on the plaintiff to show cause why the verdict should not be set aside, and a new trial had between the parties, without costs, upon the grounds, that the verdict was contrary to law and evidence, and against the weight of evidence in this, that the evidence showed no valid transfer to the plaintiff as against the defendants; that there was misdirection by the learned Chief Justice in directing the jury, that if the alleged sale to the plaintiff was a transaction for the purpose of transferring the property to him absolutely, even though made with intent to defeat the defendants' execution, it might be sustained, though the debtors who made the sale were shown to have been at the time in insolvent circumstances; whereas the jury should have been directed that such sale was, as against the defendants, void, and should (as requested at the trial) have been further directed, that if the debtors were unable to pay their debts in full, and the alleged sale was neither an assignment for the benefit of creditors, nor a sale of goods in the ordinary course of trade to an innocent purchaser, it was void against creditors generally; and that on the facts in evidence, the transaction having the effect of delaying the defendants, it was void against them.

In Trinity term, 1864, *A. MacNabb* shewed cause. He cited *Riches v. Evans*, 9 C. & P. 640; *White v. Lord*, 13 U. C. C. P. 289; *Wood v. Dixie*, 7 Q. B. 892; *Graham v. Furber*, 14 C. B. 410.

Palmer, contra.—There is a difference between a sale to a creditor and to a stranger; if to a creditor the sale is not void, although it defeats or delays creditors; but to a stranger it is void when it has such an effect: *Luff v. Horner*, 3 F. & F. 480; *Bank of Upper Canada v. Thomas*, 7 Grant's Ch. Rs. 321; *Corlett v. Radcliffe*, 4 L. T. N. S. 1; *Maulson v. Topping*, 17 U. C. Q. B. 183. A purchase, though honestly made by the vendee, is void if the debtor sold with intent to delay or defeat creditors: *Burrit v. Robertson*, 18 U. C. Q. B. 555; *Graham v. Chapman*, 12 C. B. 85; *Smith v. Cannan*, 2 El. & Bl. 35. The learned Chief Justice misdirected the jury in these respects.

A. WILSON, J.—The question involved in this case has been very fully considered in this court in the case of *Tuer v. Harrison*, in which judgment was lately given, which was in affirmance of the view taken by the learned Chief Justice at the trial.

The defendant contends, according to the terms of his rule, that a sale made by a debtor to one of his creditors, for the purpose of transferring the property absolutely to him, if made with the intent of defeating another creditor's execution, is void as against such latter creditor; and that if the debtor were unable at the time of the sale to pay his debts in full, and if the sale made were neither an assignment for the general benefit of creditors, nor made in the ordinary course of trade to an innocent purchaser, it would be void as against creditors.

We do not think the defendant can assume that the transfer in this case was made with intent to defeat creditors, because that fact was submitted to the jury and negatived by them. The question rather is, whether a sale by a debtor in insolvent circumstances of all his goods, made *bona fide*, with intent to pass the property to the purchaser, for the purpose of enabling the debtor to pay the proceeds of the sale equally among his creditors, is void against any creditor who may dispute it?

The plaintiff contends it is not void under these circumstances. The defendants, on the other hand, contend that the mere fact of insolvency defeats the sale, and that the *bona fides* of the parties has nothing whatever to do with the validity or invalidity of the transaction; it is the act by an insolvent which is avoided, and not that act if fraudulent.

The case upon this subject are very numerous, and not quite in accordance with each other; so that a very careful perusal of them is necessary to discover what rules or principles can be said to be finally or satisfactorily determined. In this country the questions of this kind now arise upon the U. C. Consol. Stats., ch. 26, sec. 18.

In England they have heretofore arisen, and still continue to arise upon the 13 of Eliz., c. 5, sec. 2, unless when the act of transfer or sale is contended to have been brought within the Bankruptcy Acts.

Our statute provides that "in case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, makes, or causes to be made any gift, conveyance, assignment or transfer of any of his goods, &c., with intent to defeat or delay the creditors of such person, or with intent of giving one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such gift, &c., shall be void as against the creditors of such person." The act then provides, that this shall not apply to assignments made for creditors generally, or to sales in the ordinary course of trade to innocent purchasers.

The statute of Elizabeth provides, that "all and every feoffment, &c., of lands, &c., goods, &c., made to the end, purpose, and intent to delay, hinder or defraud creditors and others of their just and lawful actions, &c., shall be deemed and taken (only as against the persons whose actions, &c., by such fraudulent devices shall be disturbed) to be clearly and utterly void."

Both statutes expressly avoid all transfers of property made, "to the end, purpose and intent, "to delay, hinder or defraud creditors, making, therefore, the *intent* the prohibited act or purpose.

Our statute prohibits also every such transfer which is made with the intent of giving a preference to one creditor over another. Excepting in this respect, the two statutes appear to be substantially alike in their general provisions.

The multitude of cases bearing upon this question is more calculated to confuse the mind than to satisfy it. It is necessary, also, to distinguish those cases which are governed by the Bankruptcy acts from those which are affected by the statute of Elizabeth. It was decided in *Wood v. Dixie* (7 Q. B. 892), that a sale of property in consideration of a past debt, by which it was intended the property should be transferred to the purchaser, was valid, both at common law and by the statute of Elizabeth, although it was made with the intent of defeating an execution creditor.

Darville v. Terry (6 H. & N. 807), is to the same effect. In that case the plaintiff claimed as mortgagee of the goods

under the consideration of a money advance; in other respects the circumstances and the law laid down in it are the same as in the preceding case, which was referred to and approved of. See also *Luff v. Horner* (3 F. & F. 480).

If, however, a person, who is embarrassed, transfer his property in security, even for a money advance, and knows that it is a necessary consequence of such transfer that his creditors will be delayed, hindered or defrauded, then, whatever his intention may be, the transfer will be a fraudulent conveyance under the statute of Elizabeth, so far as the debtor is concerned. But if the creditor "had not any manner of notice or knowledge of such covin, fraud or collusion as aforesaid" according to the 6th section of this act, the transfer well be available to him, notwithstanding the fraud of the debtor: *Thompson v. Webster* (7 Jur. N. S. 531, in the House of Lords); for the fraudulent act, to avoid the transaction, must have been intended and contemplated by both parties: *Lee v. Hart* (10 Exc. 555); *Pennell v. Reynolds* (11 C. B. N. S. 709); *Graham v. Furber* (14 C. B. 410).

This is different from an act of bankruptcy, for that will be effected contrary to the intention of the parties, if the act done come within the provisions of the bankruptcy statutes; per Parke, B., and Cresswell, J., in *Smith v. Cannan* (2 E. & B. 40), the latter referring to *Hall v. Wallace* (7 M. & W. 353); and see also *Smith v. Timms* (4 L. T. N. S. 827); *Hall v. Allnut* (18 C. B. 505). So a transfer will be void if its object be to defeat or delay creditors, although there was a good consideration for it: *Pennell v. Reynolds* (11 C. B. N. S. 709); *Graham v. Furber* (14 C. B. 410). But purchasing goods from a debtor at an undervalue, who intends to cheat his creditors, will not be an act of bankruptcy, and in this country will not we think under our statute be void, if the purchaser have not notice of such intention either expressly or from the nature of the transactions; *Fraser v. Levy* (6 H. & N. 16); *Baxter v. Pritchard* (1 A. & E. 456); *Lee v. Hart* (10 Exch. 555). These authorities also show, in addition to those before cited, that to avoid a transaction of this nature both parties must be implicated in the alleged fraud. No doubt, such a security may be avoided under the Statute as well as

by the Bankruptcy Acts, if too large an amount of property be transferred to a creditor, even for a present advance of money; for the surplus is really placed beyond the reach of the other creditors, who are thus to that extent defeated and delayed. But the mere inadequacy of the sum advanced in proportion to the value of the goods will not of itself be sufficient to justify the presumption of fraud, for the advance may be the means of enabling the assignor to go on with his trade, and so the transaction may be beneficial to the creditors: *Pennell v. Reynolds* (11 C. B. N. S. 709); *Bittlestone v. Cooke* (6 E. & B. 296); *Whitmore v. Claridge* (8 Jur. N. S. 1059). It may be that the *effect* of a transfer of property must be to defeat and delay creditors, but if that be not the *object and intent* of it, it would not seem to be void: *Henderson v. Lloyd* (3 F. & F. 6, per Erle, C. J.)

I do not think it at all necessary to refer to the other questions so frequently raised in considering whether transfers of property do or do not constitute acts of bankruptcy; such as a debtor making over the *whole* of his estate (not however by sale), or the whole of it with a *colourable exception*, or by a sale, and when it is enquirable into, or for a pre-existing debt, or partly for a pre-existing debt and partly for a new advance; or whether if only a portion of the entire property be transferred too large a portion of it relatively to the debt has or has not been assigned; for these would not further the settlement of this question, and would only encumber a branch of law already too well supplied with materials for discussion.

The charge to the jury in the case in hand was, that if the sale were *bona fide* with intent to transfer the property to the plaintiff, to find for the plaintiff, although the effect of it might have been to prevent the defendants taking the property in execution. The defendant's counsel contended the *bona fides*, assuming it to have existed, had nothing to do with the transaction,—that the insolvency of the debtor and the transfer not being in his ordinary course of business made the sale invalid under the Statute.

The case of *Smith v. Cannan*, to which he referred, was, whether an act of *bankruptcy* had been committed by a security being given for an antecedent debt.

Now, all the cases arising under the Bankruptcy Acts will not be found to be determinable by the same rules as sales or transfers of property at the common law or under the Statute of Elizabeth. In the present case the transaction was a sale for a present price, and was, therefore, very different from the case which was relied upon.

We do not think the case of *Wood v. Dixie*, determined that the intent and object with which a sale was made were not enquirable into so long as the parties really intended to pass the property by the sale and for a sufficient consideration; the decision was that a sale intended to pass the property was not a fraud, even although it were made with the intent to defeat a particular creditor, which I understand to mean by giving a preference over him; for if a sale were made with the express purpose of removing goods which could be conveniently seized under an execution, from the reach of creditors, and having an equivalent for them in money, in order that it might not be seized, or might not be as conveniently seized as goods, or with the intent of the money being subsequently thrown by the debtor into the fire, or that the debtor might forthwith abscond with it, or for property situated in a foreign country, or not falling into possession for several lives, it can scarcely be said that this would be a *bona fide* sale; and what was said in *Baxter v. Pritchard* (1 A. & E. 456), as to constituting an act of bankruptcy, if the purchaser had been privy to the fraudulent designs of the debtors, would probably be sufficient also to avoid a sale as contrary to the Statute of Elizabeth, under the like circumstances. There are expressions in many cases which indicate that a sale accompanied with such facts as we have stated would avoid a sale, although founded on a good consideration, as in *Graham v. Chapman*, *Smith v. Cannan*, *Thompson v. Webster*, and in *Corlett v. Radcliffe*, all before mentioned. No doubt the insolvency of the debtor is an enquirable fact, not only under our Statute, but under the Statute of Elizabeth: for if he be not insolvent, and the transaction do not necessarily make him so, his sales and transfers are all quite valid; the statute does not apply to him. But granting the insolvency of the debtors, *all* his sales or conveyances

of his property are not invalid, merely because he is an insolvent; it is only such of them as are made "with intent to defeat or delay creditors," or "to give a preference."

If, therefore, an insolvent's sale be not made with either of such intents, and be *bona fide*, it is a perfectly valid sale, just as if it had been made by a solvent person. The intent is the all-important element in such a case, and it is entirely for the jury to decide upon it.

The case of *Wood v. Dixie*, and others of that class, where a preference was held not to invalidate the transaction, would, probably, not be sustainable in this country, because our statute expressly avoids all such preferential transactions.

The debtors in this case were insolvents, or, at all events, were "unable to pay their debts in full." But they gave no "preference" to any creditor. Nor did they grant a security to any creditor for an antecedent debt. The facts shew, and the jury have so found, that they made no sale "to defeat or delay creditors;" but for the "purpose of enabling them to realize from their property, and to apply the proceeds among their creditors equally." That notes at long dates were given as the price of the goods is not a conclusive objection to the sale: it was a circumstance to be considered by the jury, in deciding on the *bona fides* of the transaction; and it was shewn that the purchaser was quite able to pay these notes. The judge was bound to leave to the jury the intent with which the sale was made, and he did so fairly and fully. He was not bound to tell them that an insolvent's sale, although not made in the ordinary course of his trade, was, however good the consideration, a void proceeding; for that, we think, is not the law.

We must observe here that we think the clause at the end of the 18th section of this statute, ch. 26, has been much misunderstood. It has been often contended that it avoids all conveyances, &c., made by insolvents, &c., which are not made for the benefit of creditors generally, or which are not made in the ordinary course of trade to individual purchasers; but this is not the meaning or the purpose of the enactment. The act simply declares that these special cases shall not be within the provisions or prohibitions of the preceding part of the section, but shall be regulated and con-

strued as they were before the passing of the statute. The words are, "but nothing herein contained shall invalidate or make void any deed of assignment, made and executed by any debtor for the purpose of paying, &c."—that is, it does not invalidate *these excepted or protected cases*, because it does not legislate for them; but it makes no allusion to the other cases which are valid by the preceding portion of the section, subject to the restrictions thereby imposed. The act does not declare that *no* conveyance, &c., made by an insolvent shall be valid, which is not made for the benefit of creditors generally and ratably, or which is not made in the ordinary course of trade, which is the construction so often attempted to be put upon it. The act merely preserves these latter transactions, notwithstanding the act; but in preserving them it does not in the least control the validity of those other transactions which are within and the special objects of the act.

It would defeat the whole scope and purpose of the act, to give this saving clause so over-ruling an effect. It is but a saving clause, and it must be so construed. Perhaps it was necessary, when preferences were expressly avoided, to provide specially for general assignments. The cases of *Riches v. Evans* (9 C. & P. 640); and *Darville v. Terry* (6 H. & N. 807) would seem to shew that this was what the legislature had probably in view by inserting this provision. There are many cases, too, where it has been contended that a sale of all a debtor's goods, although in the course of trade, for the purpose of paying his debts, was not a protected act, because it was said he was taking the law of distribution into his own hands, instead of leaving it to be accomplished by his assignees or creditors; and it may have been to meet such a case as this, that this other provision was made.

The charge to the jury was in substance the same as in *Darville v. Terry*, which was approved of by the court.

We may say we are not satisfied that this was not a sale made by the debtor in the ordinary course of his trade to an innocent purchaser. But it would seem to be an assignment, for a sale is an assignment, for the general benefit of creditors: see *Baxter v. Pritchard* (1 A. & E. 456); *Graham v. Chapman* (12 C. B. 103.) But whether this was so or

not, it is sufficient for us to say that, under the facts of the case, we think the ruling of the Chief Justice was correct in point of law ; and that the jury have found a verdict not only correct in point of law, but warranted also by the evidence.

The rule, therefore, will be discharged.

JOHN WILSON, J.—I think the charge to the jury of the learned Chief Justice was right so far as it went. But he ought to have gone further, and told them that if the vendors were, at the time of the sale, in insolvent circumstances, or knew themselves to be on the eve of insolvency, and made the sale *with intent* to defeat or delay their creditors, or *with intent* of giving one or more of their creditors a preference over their other creditors, or even any one or more of such creditors, that the sale was void, unless it was made in the ordinary course of trade to an innocent purchaser.

It seems strange that the attention of the Legislature has not been called to the circumstance, that much of the grasping oppression at present practised might be avoided if a seizure under execution were made to operate as an attachment of the property for the benefit of all creditors who chose to claim within a given time, as I understand is the law of Lower Canada. The debtor would not be pressed in the hope of the first being preferred, nor would he be at all, unless it were obvious that his property would not be safe under his management.

If a man absconds, his property is ratably divided. Why should there not be the same division if he does not abscond, but cannot meet his liabilities ? I refer of course to cases other than bankrupts.

The law is in a most unsatisfactory state. It forbids giving to one creditor a preference over another, by any positive act of the debtor ; but it permits the creditor who can first get a judgment and execution to have a preference, by allowing him to have his debt paid in full, with no regard either to the interest of the debtor or the other creditors. It permits a preference, while it forbids it : it declares that the debtor shall not prefer his creditor by any act of his own, but he may permit him to obtain judg-

ment by default, or he may defend the suit of one or more, by which others may obtain judgment first, by not defending against them, and thus preferences are in fact every day given. This very case illustrates the position in which debtors may be placed. The defendant had a claim against Luscombe and others, as accommodation endorsers of Yeomans : their creditors in their business were not pressing them, but the defendant was : his claim was about a fourth of their indebtedness : he pressed his suit against them, expecting to get his claim paid in full ; but the effect of it would have been that his execution would have absorbed the greater part of their stock, and given him the preference over the very creditors who had sold them the goods. In this predicament, the plainest dictates of honest dealing obliged them to prevent what every one must feel as a wrong. It was open to them to assign for the general benefit of all their creditors, or to do something to prevent the defendant from getting a preference. They sell their whole stock to the plaintiff at cost, at a long credit ; and they offer the notes which the plaintiff gave for this stock to the creditors ratably, the defendant among the rest. He refuses, and on his execution seizes the same stock, and now invokes the statute, which forbids a preference, to give it to him, because, he says, Luscombe & Co. were insolvent, or on the eve of insolvency, when they made the sale, and therefore it was void ; and he contends the whole falls within his grasp.

Now, did Luscombe & Co., under all these circumstances, make this sale with intent to defeat or delay their creditors, or with intent of giving one or more of the creditors a preference over his other creditors, or over any one or more of them ? Did he not rather make it, to prevent this very defendant from getting a preference over the rest ? I think the questions for the jury in this case were, first, the *bona fides* of the sale ; secondly, the intent with which the sale was made ; for no matter that they were insolvent, or on the eve of insolvency, unless the sale was made *with intent to defeat or delay* the creditors, or to give one or more of the creditors a preference over their other creditors, or over one or more of them, the sale was not void ; and the fact that this sale

was made to prevent one from getting a preference over the other, and was *bona fide*, negatives the intent forbidden by the statute.

While I am prepared to sustain the finding of the jury in this case, I dissent from the learned Chief Justice in his view of the law as declared in his charge. I think he should have charged the jury to enquire as to the intent under which the sale was made, the purchaser seeming to have been aware of the vendor's circumstances. And I dissent from my brother Wilson in his construction of the statute. I think, with great deference to the opinions of both, that the question for the jury is, with what intent the sale was made, with reference to what the statute declares shall make it void. A sale may be *bona fide* as opposed to colourable, and yet void by the statute, if the intent was to contravene its provisions.

Wood v. Dixie, practically did away with the statute of Elizabeth: the view of my learned brother Wilson will dispose of ours, I fear, very much in the same way.

RICHARDS, C. J., concurred with A. Wilson, J.

Rule discharged (a).

MILLER V. THE BEAVER MUTUAL FIRE INSURANCE CO.

Action within jurisdiction of county court—Absence of certificate—Scale of taxation—Verdict to govern.

Where a verdict is rendered in an action, and for an amount within the jurisdiction of the county court, the mere fact that the damages have been laid at a sum beyond such jurisdiction, does not entitle the plaintiff, without a certificate from the judge who tried the cause, to superior court costs.

In the absence of this certificate, the master on taxation must be governed by the amount of the verdict recovered.

Quære, whether if the claim in the declaration be *specifically* for an amount *beyond* the jurisdiction of the county court, the master may not tax the plaintiff full costs, even though the amount recovered be *within* the jurisdiction of the county court.

Osler, during the present term, obtained a rule *nisi* upon the defendants, to shew cause why the costs taxed by the master on entering judgment in this cause should not be revised, and the plaintiff be allowed full costs, although there

(a) In this case leave has been obtained to appeal.

was no certificate endorsed upon the record, and although no certificate was given or applied for at the trial; on the ground that no certificate was necessary, and that the decision of the master requiring a certificate was erroneous.

The action was brought upon a policy of insurance, dated the 21st of September, 1863, by which the defendants, under their corporate seal, promised the plaintiff that they, the defendants, would, from the date of the policy till the 18th of August, 1866, settle and pay to the plaintiff all losses or damage not exceeding the sum of \$500, which might happen by fire to the plaintiff's dwelling-house and kitchen, situate in the village of Thornbury, during the time the policy was in force.

The property was alleged to have been destroyed by fire, "whereby the plaintiff suffered loss and damage on the dwelling-house and kitchen, to wit, to the amount so insured thereon;" yet the defendants did not pay the amount of the damage and loss, "to the plaintiff's damage of \$1,000."

The defendants pleaded—1st. That the premises, at the time of the application for insurance, were encumbered by a judgment for £85 5s., recovered in the Queen's Bench, in which Darling and another were plaintiffs, and David Miller (the now plaintiff) was defendant, and which was duly registered, and upon which a *fi. fa.* was then in the sheriff's hands for execution; and that the plaintiff did not state such encumbrance in his application.

2nd. That the plaintiff fraudulently, against the conditions of the policy, stated the property to be of much greater value than it was worth.

The cause was tried before Hagarty, J., (see 14 U. C. C. P. 399) when a verdict was found for the plaintiff on both issues, and the damages were assessed at \$300.

T. Wells shewed cause.—There may have been evidence given at the trial that the demand was in reality a liquidated one, within the jurisdiction of the county court, although the declaration stated a demand which was apparently beyond its jurisdiction. The master could not tell upon this record what the actual fact was: he had to be governed by the verdict; and as that amount is within the competency

of the county court, he was bound, in the absence of a certificate, to tax the costs according to the county court scale; C. L. P. Act, sec. 328; County Courts Act, sec. 16, 17, subsecs. 1, 2; *Washburn v. Longleg*, 6 O. S. 217; *Beattie v. Cook*, 6 O. S. 217; *Gardner v. Stoddard*, Draper's Rs. 101; *Hamilton v. Clarke*, 2 Prac. Rep. U. C. 189; *Ashcroft v. Foulkes*, 18 C. B. 270; *Tonge v. Chadwick*, 5 E. & C. 590.

Osler, in support of the rule, contended that the undefined claim for damages, to the extent of \$500, and, therefore, beyond the limits of the county court, which appeared in the declaration, entitled the plaintiff to full costs; and that the cause of action itself appeared to be one which it would be erroneous for the county court to try.

A. WILSON, J.—The plaintiff will be entitled to recover full costs of suit, unless it can be shewn he is prevented from recovering them by statute.

The County Courts Act provides, among other things, that the county courts shall have jurisdiction and hold plea “in all causes and suits relating to debt, covenant, and contract to four hundred dollars, where the money is liquidated or ascertained by the act of the parties, or by the signature of the defendant.”

This is a cause and suit relating to covenant: is it also relating to covenant “to four hundred dollars?” The covenant is to pay such damages as may be sustained by the plaintiff, not exceeding \$500; and the averment of damage is said to be, “to wit, to the amount insured.” The count does relate to *five* hundred dollars; but it relates also to any sum less than five hundred dollars. If the knob of a door of the house had been broken by or in consequence of the fire insured against; or a square yard of the shingles of the roof had been destroyed; or a plank of the floor had been charred,—the remedy against the defendants would have been equally upon this covenant relating to \$500, in order to recover compensation for these injuries, although that compensation may not have exceeded the sum of five shillings. According to the plaintiff's argument, he would nevertheless be entitled to sue in one of the superior courts to enforce payment of this five shillings, because the covenant relates to

five hundred dollars ; and the master must tax him the full costs of his suit upon such a record, without any certificate of the judge, because he has the verdict or assessment of a jury in his favor to the extent of five shillings.

If this be the construction of our statutes, very little, it must be confessed, has been accomplished by our legislature; but we think this is not their proper construction, nor in accordance with the decisions of our courts.

It is manifest upon this record, that the plaintiff's demand was not for \$500 specifically ; but was a claim for any amount not exceeding that sum, which he could establish by proof. The record did not, before the trial, shew that this claim could have been brought in the county court ; but the record does now, since the trial, shew that the suit might have been of the proper competence of the county court. If the record shew the cause could have been tried in the county court, the master can see from the record itself that no certificate would be required ; but if the record itself do not shew which way the case truly is, then the master can only be governed by the amount recovered : and as, in this case, that sum was \$300, the master could not positively tell whether the amount was liquidated by the act of the parties or by the signature of the defendants ; but he can tell that \$300 *might* be recovered in a county court, upon just such a cause of action as this record disclosed ; and as the judge who presided at the trial has not determined how this was by his certificate, the master was right in assuming it was not a fit cause to be withdrawn from the county court, just because the judge, who was the proper person to have determined this fact, had not decided it affirmatively in the plaintiff's favor.

The rule, therefore, will be discharged with costs.

Rule discharged with costs.

PEARSON V. RUTTAN ET AL.

Action against Division Court bailiff and sureties—Non-avoidance of statutory covenant—Conditions precedent to bringing of action—Pleading—Non-suit—Con. Stat. U. C. ch. 19.

Sec. 25 of ch. 19, Con. Stat. U. C., is directory, not mandatory. *Held*, therefore, in this case, which was an action against a bailiff and his sureties for an excessive seizure by the former, and a sacrifice of plaintiff's goods, that the fact of the sureties of a division court bailiff being non-residents of the county in which the bailiff's duties lay, did not avoid the covenant into which they had entered on his behalf, the provisions of the section in question being merely intended for the guidance of the judge as to the class and character of sureties to be required and approved of by him.

Held, also, that in an action against a bailiff of a division court for his own torts, the demand of perusal and of copy of warrant, under sec. 195 of ch. 19 Con. Stats. U. C., is not requisite, the same being only necessary in cases of "defect of jurisdiction or other irregularity in or appearing by the warrant," in order that the clerk and not the bailiff may be made liable.

Held, also, that in such an action as the present a bailiff is entitled to notice before suit brought, even though the proposed suit be upon the statutory covenant; that such action must be brought within six months; and that this defence may be raised under a plea of the general issue by statute.

Quære.—1st, Are the sureties of a division court bailiff, in a joint action against principal and sureties, entitled, even under a special plea, to raise the defence of want of notice of action to themselves? 2nd, Can they in such an action plead the want of notice to the bailiff in their own protection? 3d, Can they, in an action against *themselves*, take advantage of the want of notice to the *bailiff*, or of any other defence that would have been open to the latter?

But *held*, in this case, that as the principal and sureties had been joined in one action, and the recovery must, therefore, be against all or none, the discharge of the principal involved that of the sureties.

The declaration was upon the covenant made by Charles S. Ruttan, one of the defendants; as bailiff of the 6th Division Court of the United Counties of Peterborough and Victoria, and by the other two defendants as his sureties for the due performance of the duties of his office, according to the statutes.

The plaintiff alleged that Charles S. Ruttan, as such bailiff, had certain writs of execution against the goods and chattels of the now plaintiff, issued out of the said division court, delivered to him to be executed, to the amount of £25, and no more, for debts, costs, fees and charges; that he seized goods of much more value than £25, and sold of the goods much more than was sufficient to pay the amount he was required to make, to wit, the whole of the goods which he had seized, and levied thereout a much greater sum than the said amount, to wit, to the amount of £150; and also then sold the said goods for a much less sum than the same were reasonably worth, and for which he could and might

have sold the same, and converted the monies arising from the sale to his own use; whereby the plaintiff, being a party to a legal proceeding in the division court, has been damaged. A further breach was also stated: for that the said Charles S. Ruttan illegally and oppressively exacted from the now plaintiff, under certain executions which he had as bailiff against the goods of the now plaintiff, more and other fees than there was and is by law provided and limited in that behalf; that is to say, divers large sums of money, amounting to £50 more than over and above the legal and reasonable fees and expenses demandable by the statute for executing the said writs, and over and above the amounts thereby directed to be levied, contrary to the form of the statute in that behalf; whereby, &c.

Henry Ruttan, one of the defendants, pleaded: 1st, That the deed was not his deed. 2nd (to the first and second counts), That Charles S. Ruttan did not misconduct himself as such bailiff, to the damage of the plaintiff, being a party to a legal proceeding in the said division court. 3rd (to the first breach in the first count), That after the seizure of the goods by Charles S. Ruttan, under the executions, one Thomas Pearson, then being the landlord of the plaintiff of and for the premises on which the goods were at the time of the seizure, gave notice that \$270 were due to him at the time of the seizure, for rent accruing due in one year, and required Charles S. Ruttan to distrain for the same, who distrained accordingly, and who also levied for the amount of the said executions; and also for and upon another execution, at the suit of one Wood, issued from the said division court against the goods of the now plaintiff, and one Menthorn as defendant; and Charles S. Ruttan did not sell and dispose of more of the goods of the plaintiff than were sufficient and necessary to satisfy the said executions and rent, and the fees thereon. 4th (to the second breach in the first count), That Charles S. Ruttan did not sell the said goods for a much less sum than they were reasonably worth, and for which he could and might have reasonably sold the same. 5th (to the third breach in the first count), That Charles S. Ruttan did not convert and dispose of the monies arising from the sale to his own use. 6th (to the second count),

That Charles S. Ruttan did not exact, receive and take from the plaintiff, for execution the executions, more and other fees than were and are by law provided and limited in that behalf.

John W. Thompson, one of the other defendants, pleaded the same pleas as his co-defendant Henry Ruttan.

Charles S. Ruttan pleaded not guilty by statute.

The plaintiff took issue upon all of these pleas.

The cause was tried before the Chief Justice of this court, at the last spring assizes, held at Lindsay, and a verdict was rendered for the plaintiff, and \$300 damages.

The evidence was as follows:

A certified copy of the warrant was put in.

Elijah Lake said: "I was at the sale of plaintiff's goods. Plaintiff forbade the sale at the time. There was something said about rent; that there was no rent, and the bailiff was not to sell for that. I understood the bailiff sold for rent. Some few days after the sale, he told me he had understood there was no rent. I said to bailiff he had been pretty hard on the plaintiff. The bailiff said he was bound to sell him out any way. There was property sold to pay a great deal more than \$100. Plaintiff was sold out completely. Bailiff said he had received notice of rent, but since that he heard there was no rent. The sale was conducted in the usual way."

W. H. McLaughlan proved a valuation of the property sold by the bailiff, amounting to \$598 50c.

The amount of the different division court executions, including fees, was \$169 98c.

The amount of the county court executions of Hatton's was \$184 82c.

This payment was held not to be admissible in evidence.

The notice of rent was dated 2nd January, 1862, and was delivered by the plaintiff to the bailiff. It was signed by Thomas Pearson, and stated that \$275 were due by plaintiff to Thomas Pearson, for one year's rent of premises.

A notice of action to the bailiff was put in, signed by plaintiff.

It was proved that the co-defendants of the bailiff, who are his sureties, did not at the time of entering into the covenant, nor since, reside in the county of Victoria.

It was contended for the sureties at the trial, that they were not liable, because of their not being residents of the county according to the statute (Con. Stats. U. C. ch. 19, sec. 35); and that they were entitled to notice of action under sec. 183.

The same objections were taken for the bailiff.

The Chief Justice overruled the objection as to the residence, holding the statute to be directory, not mandatory; and as to the notice of action, he overruled the objection on the part of the sureties, and pointed out that the want of notice had not been raised by plea.

It was also further objected for the bailiff, that the notice served on him was insufficient, and it was so held; and that there was no demand of the perusal and a copy of the warrant under sec. 195; and that the action had not been brought within six months under sec. 193.

It was answered for the plaintiff, that no notice of action was necessary, as the suit was for the bailiff *not* doing his duty, and not for anything he *had* done.

Leave was reserved to the bailiff to move to enter a nonsuit on the two points, of want of notice, and of the action not having been brought within six months.

For the defendants the following evidence was given:

John Dillman stated: "The plaintiff said, on the day fixed for the sale, that Pearsons had a landlord's warrant, and the plaintiff wished the witness to buy the things in, to the amount of the rent: it was to an amount over \$200."

John R. Little stated: "I understood the plaintiff had delivered the notice from Thomas Pearson, claiming rent, to the bailiff. The bailiff said, without he got a writing to be relieved from the rent, he would go on and sell for it. Plaintiff said there was no rent due, and that Pearson did not claim any rent."

The section of the act relating to the bailiff's duty when a claim to rent is made, is sec. 177.

The Chief Justice asked the jury to say, whether they were satisfied that the bailiff did actually receive a notice of

claim for rent from Thomas Pearson ; and if so, was such notice given with the knowledge and concurrence of the plaintiff, and did the bailiff receive it, the bailiff representing it as a *bona fide* claim ; and whether they believed the bailiff was acting in good faith in relation to this claim, and sold for it after the plaintiff had notified him that there was no rent due, and before the sale. If he did act in good faith in making the levy and selling, the defendants were not liable.

The last part of the charge was objected to by the plaintiff's counsel.

The jury found for the plaintiff, as before mentioned.

In Easter term last, *H. Cameron*, on behalf of the defendants, obtained a rule *nisi*, calling on the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered as to defendant Charles S. Ruttan, pursuant to leave reserved, on the grounds, that no sufficient notice of action was given ; that there was no demand made of a copy and perusal of the warrant acted on ; that the declaration varied from and was more extensive than the notice of action ; and that the action was not commenced within six months from the seizure, or from the first sale. The rule was also to set aside the verdict against the other defendants, and for a new trial, for misdirection of the learned judge in ruling that the said defendants were liable on the bond, although they were not nor are residents of the county, and that they were not entitled to notice of action ; and that the action was brought in sufficient time ; and for a new trial as to all the defendants, on the ground that the verdict was perverse and against the evidence, and the weight of evidence, which showed clearly that the plaintiff had put forward the claim for rent referred to in the pleadings and evidence, and that the defendant Charles S. Ruttan had acted upon it *bona fide*, and was justified in so doing ; and that the plaintiff was not entitled to recover against the defendants.

During Trinity term last, *M. C. Cameron, Q. C.*, shewed cause.—No notice of action was necessary (*Dale v. Cool*, 6 U. C. C. P. 544) ; nor was there any plea raising it, even if it should have been given ; nor was any demand of peru-

sal or copy of warrant required; for the misconduct of the defendant was what was complained of, and not anything illegal on the writs, or in the act of granting them: *Sayers v. Findlay*, 12 U. C. Q. B. 155. This was an act of omission of the bailiff, and not anything done to bring him within section 193 of the statute. It was no defence for the sureties that they were not residents of the county, for the statute is not mandatory: *The Corporation of the Township of Whitby v. Harrison*, 18 U. C. Q. B. 603; *The Municipality of Whitby v. Flint*, 9 U. C. C. P. 449; *Couse v. Hannan*, 14 U. C. C. P. 26. The verdict cannot be said to be perverse, unless it is against law, which cannot be said here: *Brown v. Malpus*, 7 U. C. C. P. 189.

H. Cameron, contra.—The action, although formally on the statutory covenant, is in reality for a tort; and if it is held that it is not necessary, when a tort is so prosecuted under the covenant, that there should be a notice of action, it will be equivalent to a repeal of the statute passed for the protection of persons acting under it. The same observation applies to the demand of perusal and copy of the warrant. The sureties also were entitled to notice. He cited *Moran v. Palmer*, 13 U. C. C. P. 528.

A. WILSON, J., delivered the judgment of the court.

The real complaint against the bailiff is, that he sold the plaintiff's goods to enforce the payment of \$275 rent, when, as the plaintiff says, that rent was not due. The valuation of the goods sold was, as the witness states, \$598.50. The division court executions amounted to \$169.98, and the rent in question to \$275, making together \$444.98, and leaving a difference between this last sum and the valuation of \$153.52, which can hardly be called an excessive seizure, to meet the exigencies of a bailiff's sale, if the rent were rightly levied for.

The learned Chief Justice left every question relating to the claim for rent fully to the jury; and although we may think the verdict might more properly have been the other way on this part of the case, we cannot say that the jury have so wilfully gone wrong in their conclusions that we can properly interfere.

It was the plaintiff who gave the bailiff the claim for rent against himself; and if the jury had found for the defendants, we should have been disposed to think that the debtor, having put forward this fraudulent claim against himself to defeat the executions, could not call upon the bailiff afterwards to disregard the claim upon his mere word and request, against his acknowledged landlord's written declaration that the rent was in fact due; and more particularly when the bailiff, to reach the executions, must first of all cover the rent by the sale which he had to make.

But, on the other hand, the jury may have believed that the bailiff knew, when he got the pretended landlord's notice, that it was in fact the debtor who was putting it forward for his own purposes, and that no such rent was due at all; and that, as it was under the debtor's control altogether, he should have obeyed the debtor's direction, when he gave it, not to enforce it, because it was not due. The plaintiff has been the author of his own injury, and does not deserve much consideration; but all this was before the jury, and it was for them to decide upon it.

No authority was cited in the argument showing the covenant to be void, because the sureties were not residents of the county in which C. S. Ruttan was acting as bailiff; and we see nothing which makes it obligatory to observe this provision, and which must necessarily avoid the covenant if it be not observed. The words, "being freeholders and residents within the county," were intended as a guide to the judge as to the class and nature of the sureties which he ought to require and which he should approve of; but it never could have been contemplated that the public should lose the benefit of the security which was given, if it afterwards turned out that the sureties were not freeholders, or, being freeholders, were not residents within the county; and we think if there could have been authority for such an objection being available, it would not have been wanting. Many instances are given in *Morgan v. Perry* (17 C. B. 343) of what are directory and what are imperative statutes, which shew that the 25th section of this act is for the former character, and that a strict non-compliance with it will not avoid the security professedly given under it. The case

then is reduced to the consideration of whether a notice of action was required to be given to the bailiff or to the other defendants as a condition precedent to bringing the action, and if so, whether it was necessary to plead the want of it; and whether the action should have been brought within six months, and if so, whether this objection can be taken without a plea to that effect; and, lastly, whether the action will lie without a demand of the perusal and copy of the warrant. All three objections arise under secs. 93, 94, and 95 of the statute.

We think sections 196 and 167 shew that the demand for perusal and a copy of the warrant is only required in cases where a "defect of jurisdiction or other irregularity exists in or appearing by the warrant," so that the clerk who issued the warrant, and not the bailiff, may be made responsible, and not to cases where the jurisdiction and validity of the warrant are not questioned, and the bailiff is proceeded against for his own individual act and misconduct, and the clerk could not in any way be made responsible for it.

Sayers v. Findlay, cited in the argument, is a decision upon this very point and principle; and it was long ago held, under the provisions of the 24 Geo. II, ch. 44, from which the above sections 196, and 197, all similar enactments, are copied, that "where the justice cannot be liable, the officer is not within the protection of the act:" *Money v. Leach* (3 Bur. 1768).

As to the notice of action, the plaintiff contends that the action is not brought for an act done, that it is, in fact, for not paying over the excess of the money the bailiff levied; and *Dale v. Cool* (6 U. C. C. P. 544) is relied upon for this purpose. In that case the action was for money had and received by the bailiff, and it was brought against the bailiff alone to recover the excess of monies remaining in his hands after the payment of certain executions.

The declaration in this case complains that the bailiff "seized goods of much more value than were sufficient to pay the amounts he was required to make, and levied thereout a much greater sum than the said amounts;" that he "sold the goods for a much less sum than they were reasonably worth, and for which he could and might have sold

them;" and that he "oppressively enacted, under colour of certain executions, more and other fees than are limited in that behalf." All of these are very plainly *acts done*, and not *omissions*, as the *not paying over* surplus monies was held to be in *Dale v. Cool*.

Something was said that as the action was on *the covenant*, and not an action for tort, no notice was required; but we cannot fail to see that while it is in form an action of covenant, brought upon the statutory security, it is to recover damages for the acts and misconduct, specifically complained of as torts in the declaration, and as constituting a breach of the bailiff's covenant. The case of *Charrington v. Johnston* (13 M. & W. 856) shews this. If it were otherwise, we should be depriving those persons who are entitled to the protection of the statute, of that very protection which the statute expressly granted to them.

We think then these were *acts done* by the bailiff, and that the remedy adopted being by the election of the party upon the covenant, the same rule must be applied in such a case as to notice of action and otherwise, as if the claim had been made by the ordinary and appropriate form of action at the common law. It was not questioned at the trial that these acts were not done *in pursuance of the act*, and probably it could not have been done so successfully; we must, therefore, assume that they were so done. Unquestionably they were done by the bailiff "in his office of bailiff," otherwise the plaintiff can have no remedy on the covenant. Should this defence, then, of want of notice, have been specially pleaded by the bailiff?

The 194th section enacts, that "if tender of sufficient amends be made * * the plaintiff shall not recover; and in any such action the defendant may plead the general issue, and give any special matter in evidence under that plea." And it concludes thus, "And see the act to protect justices of the peace and other officers from vexatious actions." This section, and the 193 section, which begins, "any action or prosecution against any person for anything done in pursuance of the act," &c., and which provides for the notice of action being given, were both contained in the one section (sec. 107) of the 13 & 14 Vic. ch. 53. In this

previous act the words at the end of that section, "and it shall be lawful in any such action for the defendant to plead the general issue," &c., the word "such" clearly applied to the whole of the section, and had not reference to "all actions and prosecutions" mentioned at the beginning of that section, and were not confined to those actions only in which tender of amends had been made or money paid into court.

If sections 193 and 194 can be construed as section 107 in the act of 1850, then these defendants, or the bailiff at any rate, were not required to plead the want of notice. There are three sections, the 192, 193 and 194, contained under the one heading of the consolidated act, which reads "Limitations and Notices of Actions for things done under this Act." If the words "in any *such* action" in the 194 section apply to the actions under the heading above mentioned, and which are more expressly mentioned in section 193 as "any action or prosecution," then it was not necessary to plead specially. No doubt this was the construction of the act of 1850, and it appears to have been the like intention of the legislature in the present consolidation; but the question is, whether we can judicially declare it to have been so enacted. If the restricted meaning be applied to this section, then the defendant is permitted, where he has made a tender or paid money into court, to plead the general issue and to give any special matter in evidence under it, and not merely the fact of such tender or payment into court. But why, because he has tendered amends, should he be allowed to give *any* special matter in evidence, accord and satisfaction, for instance, or leave and license, arbitrament and award, or release, or any other special defence, having no necessary connection with or relation to such tender, but all of them, in fact, inconsistent with and repugnant to it?

The reference also to the "Vexatious Actions" Act in this section is very important, which extends to "any officer or person fulfilling any public duty, for anything done by him in the performance of such public duty," and would include this bailiff; and in which act the defendant is authorised to plead the general issue, and to give the special matter of defence, excuse or justification in evidence under it.

We think that the words "and in any *such* action" mean in *any* action, and not only an action in which a tender or payment into court has been made, and are to be read as a separate member of the section. By this construction the original intention of the act is preserved, and it is made reconcileable, also, with the "Vexatious Actions" Act, and with itself. We refer to the observations of Lord Chelmsford on the word "*such*" in the case of *The Eastern Counties Railway v. Marriage* (6 H. & N. 941).

We, therefore, think that the bailiff was entitled to a notice of action before the action was brought against him, and that he is entitled to the benefit of this objection, which was covered by the plea of the general issue by statute, and which was taken at the trial, and renewed by him in the present rule.

We are not satisfied the sureties are entitled to raise this objection for themselves, even if they had pleaded a plea which would have raised the question, although they may, perhaps, be entitled to set up as a defence to any proceedings taken against themselves, any matter of defence which could have been available to their principal, if he had himself been sued. If, therefore, they are not entitled to be notified before they are sued, it may be that they can plead the want of notice to the bailiff in their own protection. If this be not so, it would, in effect, be making the bailiff liable in every case, without a notice, because his sureties must be entitled to be indemnified for all recoveries had against them as his sureties. But it is not necessary to decide this, for they have pleaded no plea of this kind, although the case was argued for them as if they had the right to the benefit of this objection. The result, however, of the decision in favor of the bailiff, is to acquit the sureties also, for the recovery must be against all the defendants or against none of them. It is, therefore, not necessary to notice any of the other objections.

The rule, therefore, will be absolute to enter a nonsuit.

Rule absolute accordingly (a).

(a) In this case leave has been obtained to appeal.

MATTHEWSON ET AL. V. HENDERSON ET AL.

Composition deed—Fraud.

Where J. H., R. M., and F. H. had agreed to give their promissory notes to the creditors of E. F. (who had already made an assignment for their benefit) in composition for the debts of E. F., at 10s. in the £, and for the benefit of the creditors had executed a deed to that effect, but in the expectation and faith that E. F. would receive back from the assignees one-half of the stock of goods assigned by him, and that C. would receive the other half, he and E. F. thus becoming co-partners in the goods, and the goods were afterwards all delivered to C., with the knowledge and assent of E. F.

Held, that the deed of J. H., R. M. and F. H. could not be avoided on the ground of fraud, because there was subsequently a partial failure in the arrangement, on the faith of which they had made the deed.

If a deed be obtained by fraud, a person innocently taking under it for valuable consideration will be protected.

The declaration stated that the defendants, on the 23rd of May, 1860, made their deed in the following form:

“We, John Henderson, Robert Matchell and Francis Hammell, having learned that Edward Ferguson by misfortune in trade, has been rendered unable to pay his debts in full, and having full confidence in his integrity; and whereas certain of his creditors have agreed to accept of a composition of ten shillings in the pound on their respective claims; and whereas it is possible that other of his creditors will do likewise; now, therefore, in consideration of the premises, and of one shilling in hand paid to each of us, we hereby bind ourselves, &c., to and with such of the creditors of the said Edward Ferguson as shall, within two months from the date hereof, express their consent to the hereinbefore recited condition, or their legal representatives, firmly by these presents, as follows—that is to say, to give to each of them our joint and several notes of hand, payable in six, nine, and twelve months from the 17th of May, 1860, for such an amount as shall be equivalent to the said sum of ten shillings for each pound of their respective claims; and we further promise and bind ourselves to execute and deliver the said notes on demand of the creditors, or the representatives of the creditors, who shall accept of the aforesaid composition, within the space of two months; and, for the due fulfilment of the aforesaid conditions, we bind ourselves, &c., to and with the creditors of the said Edward Ferguson, who shall consent to the said composition, in the manner and time aforesaid, each in the penal sum of six hundred pounds of

goods and lawful money, to be made and levied, &c., on failure on our part to fulfil the conditions of this agreement or any part thereof."

The plaintiffs then alleged, that before and at the time of the making of this deed they were creditors of Ferguson, and entitled to avail themselves of the terms of the deed; that Ferguson had been and still was indebted to them in a large sum, to wit, £1,800; that they, within the two months from the date of the deed, expressed their consent to accept, and agreed to accept of a composition of ten shillings in the pound of their debt, as provided in the deed; that they did, also, within the two months, in writing, at the foot of the deed, accept the benefit of the deed, which written acceptance was as follows, "We; the undersigned creditors of Edward Ferguson, agree to accept a composition of ten shillings per pound on our respective claims, as per terms annexed on said agreement;" that no other creditor of Ferguson than the plaintiffs, within the said two months, expressed his consent to accept, or agreed to accept, a composition of ten shillings in the pound on his claim, as provided in the deed; and although the conditions were performed, &c., &c., yet the defendants had not executed and delivered to the plaintiffs the said notes of hand, or any or either of them, payable at the said times, or at any other times or time for the said amounts, or any or either of them or any part thereof, or for any other amount or amounts, but had wholly neglected and refused so to do; and, also, notes of hand, or any of them, on demand of the plaintiffs, nor had the defendants paid to the plaintiffs any of the monies, for the payment whereof the defendants bound themselves by their deed as set forth.

The defendants pleaded:—1. That the deed was not their deed.

2. That the deed was obtained from them by the plaintiffs and others in collusion with them, by fraud, covin, and misrepresentation.

3. That the plaintiffs were not, at the time of the making the deed, and had not since continued to be creditors of Ferguson, and entitled to avail themselves of the terms of

the deed, nor had Ferguson been nor was he indebted to the plaintiffs as alleged.

4. That the plaintiffs did not, within the two months from the date of the deed, express their consent to accept, and did not agree to accept of a composition at the rate of ten shillings in the pound of their claims, as provided in the deed; nor did the plaintiffs, within the said two months, in writing at the foot of the deed, accept of the benefit of the deed, as alleged.

5. That the plaintiffs did not demand of the defendants to execute and deliver the said note referred to in the declaration.

The sixth, seventh and eighth pleas had been already disposed of by the judgment of the court on demurrer: 12 U. C. C. P. 96

The plaintiffs joined issue on these pleas.

The cause was tried before Hagarty, J., at the last Spring Assizes for the county of Grey, when a verdict was found for the defendants.

J. Paterson obtained a *rale nisi* on the defendants to shew cause why the verdict should not be set aside and a new trial had:—1. Because of the misdirection of the learned judge in telling the jury, that, in order to establish the second plea, it was not necessary for the defendants to prove moral fraud on the part of the plaintiffs, but it was enough for the defendants to shew, that, as an inducement to them to execute the contract sued upon, the person who procured the deed from them, whether authorized to act for the plaintiffs or not, made a representation which was not afterwards performed.

2. Because of the non-direction of the learned judge, in refusing to tell the jury that there was no evidence to support the second plea.

3. Because the verdict was contrary to law and evidence, inasmuch as the person who made the representation or statement upon which the defendants professed to rely was not authorised by the plaintiffs, or by any other person having authority to make the same; that the statement or representation was no part of the contract between the parties, but collateral thereto; that it was not proved to have been

fraudulent on the part of the person who made the same; that even if fraudulent on his part, the plaintiffs were not responsible for the same; that the remedy of the defendants, if any they had, was against the person who made the statement, representation or promise, on the faith of which they executed the deed, and was not in this action on the deed.

4. Because, under any circumstances, the plaintiffs were entitled to recover on the issues on the first, third, fourth and fifth pleas, while the verdict was general for the defendants on all the issues on the record.

Creasor shewed cause.—The fraud was a matter of fact, and was fairly left to the jury. The evidence was sufficient to support the verdict. The consent was not sufficiently given by the plaintiffs that they would accept the composition: there was no notice to the defendants given of such acceptance. He referred to *Attwood v. Small*, 6 Cl. & Fin. 413; *Paisley v. Freeman*, 2 Smith's Leading Cases, 68; *Railton v. Matthews*, 10 Cl. & Fin. 934; *Broome's Commentaries*, 342-4-8.

Harrison in support of the rule.—There was no fraud against these plaintiffs, therefore, the second plea was not proved: the learned judge's ruling on this issue was wrong in law. There was no fraud in fact committed by the assignees upon any one: they believed that what it is said they engaged to do would be done, and they meant to do it: the most that can be said is, that they failed, and not wilfully either, to carry out their engagement. He cited *Cornfoot v. Fowke*, 6 M. & W. 358; *Udell v. Atherton*, 4 N. T. N. S. 797; *Thom v. Bigland*, 22 L. J. Ex. 243; *Evans v. Collins*, 5 Q. B. 804-820; *Ormrod v. Huth*, 14 M. & W. 651; *Rawlings v. Bell*, 1 C. B. 951.

RICHARDS, C. J., referred to *Burrows v. Gates*, 8 U. C. C. P. 121.

A. WILSON, J., delivered the judgment of the court.

The evidence shews that the defendants signed the agreement at Ferguson's request. Ferguson in his evidence said, "I told them I would be in an equal position to have half the stock: on this they agreed to become my sureties: they signed the agreement confiding in me." Williams said,

“Ferguson brought the defendants to Stark’s tavern to sign the agreement. * * * Ferguson had told us of these defendants as his sureties.”

The evidence also shews that the inducement and consideration for the defendants becoming parties to the agreement were, that Ferguson was to get half of the stock. Williams said, “All they stipulated for was, that Ferguson should have half the assets.” Ferguson said, “Williams and I told the defendants that half the stock was to be sold back to me and half to Campbell. * * * They would not have signed unless they received some value, so that their paper (the notes they were to give for the ten shillings in the pound) would be protected.” And it is said that Ferguson never did get half of the stock as promised: he said in his evidence, “I got no control of the goods: the arrangement made with the defendants was not carried out.”

And this is the fraud, covin, and misrepresentation charged upon the plaintiffs in obtaining the deed in question. The facts appear to be that Ferguson had failed in business, to what amount does not appear; nor does it appear what the amount of his stock and assets was. He made an assignment of all his estate, real and personal, to Sproatt and Crawford, for the benefit of his creditors. While matters were in this state, some of Ferguson’s creditors agreed to take ten shillings in the pound, and as an inducement for the others to do so, Ferguson procured the defendants to agree to become his sureties that the ten shillings in the pound to be paid to the creditors would be paid to them.

The defendants consented to become sureties, but it seems singular there is no evidence that they knew the extent of the liability they were about to assume, nor the value of the estate which was to be given up, on this arrangement being perfected. The terms on which they were willing to become responsible were, that the creditors should take ten shillings in the pound in full of their claims on Ferguson; that all the stock and assets should be given up by the creditors and assignees, which Ferguson had transferred to Sproatt and Crawford; that Ferguson should get one-half of the stock, without paying anything for it; that the other half should be sold to Campbell, who was to give security for his half;

which security, as I understand the evidence, was to be given to the defendants, "as the value they were to receive that their paper would be protected;" and that Ferguson should give the defendants security also for the half which he was to get.

It would appear that the defendants believed that as Campbell was purchasing one half of the stock, and giving security for it, and as Ferguson was compounding with his creditors, by paying only one half of his debts, the amount of Campbell's purchase would be sufficient to pay the amount of Ferguson's reduced liabilities, which they were assuming, and would be coming in, so as "to meet and protect their paper." The deed was then signed by the defendants on this understanding and on these representations, made to them by Ferguson himself, and by Williams, acting for two of the creditors, and, as I gather from the evidence, for the assignees also.

When the deed was signed, Campbell certainly did get his own half of the goods, and gave his notes for them to Crawford and Sproatt, the assignees of Ferguson: but Ferguson and the defendants say that Ferguson never received the other half. Now, as to this remaining half, the evidence shews, as Williams said, "that Campbell was to join Ferguson in purchasing the stock which had been previously assigned to Sproatt and Crawford." It also appeared that Campbell was to give the defendants security for the one half and Ferguson for the other half; that Campbell was to put another person of the name of Campbell in possession of his share of the goods; and the defendants were to put one Babington, or Ferguson himself in possession of Ferguson's share of the goods; and, as Ferguson said, that "Campbell and I were to have a *joint* interest."

There can be no doubt, then, that it was arranged that Campbell and Ferguson should become practically and, it would seem, actually partners in this stock.

Then it appears that Campbell, who was to get one half of the stock, not only did get it, but that he got the whole of it. Ferguson said, "Neil Campbell [the purchaser of the one half] was put in possession of all by Crawford, one of the assignees, and his notes taken for the half; and he

also gives his notes for Ferguson's half, to the extent of five shillings in the pound. * * * All the goods were given over to Campbell." Sproatt also said "Neil Campbell got the goods." And it would appear that Campbell got possession of the whole, if not by consent of the defendants, at all events without any objection from them: he got them certainly with Ferguson's knowledge and consent, it would seem; from which there is quite sufficient to infer the acquiescence and consent of the defendants also, if that should be at all material.

Why, then, upon this deed being executed by the defendants, and the assigness giving up all the goods to Campbell for Campbell and Ferguson, and everything else being carried out which it was agreed should be done, should not the defendant be held to the terms of the deed?

Suppose, even, that Ferguson did not in truth get his half of the goods, was that any fraud to effect the validity of the deed itself? It does not appear there was any precedent fraud or conspiracy to cheat the defendants of the one half of the goods contemplated; on the contrary, the one half was given to Campbell, the proper person, and the other half to Campbell also, who was Ferguson's partner, in pursuance of the deed which the defendants gave: the assignees parted with all the goods which they had as trustees for Ferguson's creditors, in consideration of the deed. All this is a good consideration by the plaintiffs, who were creditors of Ferguson, for the defendants' promise.

The difficulty respecting the half of the stock probably arises from the fact that Campbell, as Ferguson said at the trial "ended by making an assignment." But still he could only deliver over rightfully his own share of the goods, partnership or otherwise, to his assignees or creditors. It is in this way Ferguson "never got any control of the goods," as he said at the trial.

The real estate, which Ferguson made over to Sprott and Crawford, Sproatt "still holds," and, as he said, "when the ten shillings in the pound is paid, the land remains for the defendants' benefit;" that is, it will remain as a security for the defendants, that they are repaid all the liabilities which they have assumed.

Upon the evidence, the learned judge directed the jury that, as to the first issue, he would ask them to say if the deed were absolutely delivered by the defendants, to be acted upon unconditionally as an operative instrument, or whether it was executed as an escrow, subject to conditions which had not been performed; that, as to the second issue, he would leave it to them to say if the deed were obtained by fraud or misrepresentation, as alleged; that the plea charged misrepresentation by the plaintiffs and others acting in collusion with them; but, in the absence of anything then before him, he would hold that if the plaintiffs seek to take a benefit under the deed, the defendants have then the right to connect them with the manner of its execution; that if the deed were completely executed on the faith of something being subsequently done, it could not be defeated by the failure to perform such subsequent act; there must be something amounting to fraud, deceit or misrepresentation, in getting the deed; that the chief act relied on by the defendants seemed to be, that Williams represented he had the assignees' authority to agree that half of the stock should be given over to Ferguson; he said he had this authority from Crawford, one of the assignees; whereas Sproatt, the other assignee, said the assignees never intended to give any of the stock to Ferguson.

Harrison requested, at the trial, that the learned judge should tell the jury that the fraud set up must be a moral fraud, and that there was no evidence to sustain such a case.

Creasor contended the jury should be told that the consent given by the plaintiffs was not a sufficient consent by being merely written on the deed; that the defendants had never received any notice of it.

The learned judge added, that it would seem the plaintiffs had never altered their position in any way, and that he felt much doubt in disposing of the case; but the defendants would not consent to any leave being reserved, or to leave the case to the court upon the evidence.

The jury found generally for the defendants.

It will be seen, then, that the creditors of Ferguson had the benefit of the assignment of Ferguson's stock and assets, real and personal, which he had made over to Sproatt and

Crawford as trustees; that by the arrangement which was made with the defendants, the stock and assets were to be given up by the assignees, that is, in effect, by the creditors, to Ferguson and Crawford, or to the defendants (for part of this is not very clear); and the creditors were to take a composition of ten shillings in the pound in full of their debts from the defendants.

The assignees, that is, the creditors have given up the stock and assets: the creditors have reduced their claims against Ferguson (or the plaintiffs have at any rate), to ten shillings in the pound; and now the defendants say that because all the goods, instead of half only, were delivered to Campbell, and because Ferguson did not personally get the other half, although his partner Campbell did, and notwithstanding the assignees got the notes from Campbell; yet they are not liable under the deed, because they say it was obtained from them by the fraud, covin, and misrepresentation of the plaintiffs and others acting in collusion with them.

There does not seem to be a particle of fraud in the transaction on the part of the plaintiffs, or on the part of any one for whose conduct they can be made responsible: the utmost that can be said is, that a promise to give Ferguson one half of the goods was not carried out literally by delivering them into his own hands, and that the delivery of them to his partner is such a fraud as to avoid the whole negotiation and concluded bargain. This is to make a part failure of performance, putting it upon the most favorable ground for the defendants, a cause for avoiding the deed itself, and to constitute a mere breach of agreement a sufficiently gross act of fraud to invalidate the whole transaction, although nine-tenths of it may have been fully and literally carried out; and it is against such a construction being placed upon a mere alleged failure of performance, that the learned judge so explicitly charged the jury, "that if the deed were completely executed on the faith of something being subsequently done, it would not be defeated by the failure to perform such subsequent act; there must be something amounting to fraud, deceit or misrepresentation in getting the deed." Yet the jury have found that such subsequent act did not avoid the deed previously executed.

It is said that Sproatt's declaration, "that the assignees never intended to give a portion to Ferguson, nor did he ever authorize Williams to make any such promise or misrepresentation," is evidence of fraud, direct and positive, to avoid the deed; but this is only the statement of one assignee: and after all, the whole which Williams had promised on the authority of Crawford, the other assignee, was actually carried out; so that if that was fraud at all, it was fraud practised, not upon the defendants, but upon Sproatt, one of the assigness.

The observation of the learned judge, "that the plaintiffs had not altered their position in any way," can scarcely be said to be quite right; for we think the giving up of the stock and assets by the assignees, who were sureties for the plaintiffs, was an altering of their position; and this may, no doubt, have had much to do, standing as it did without any explanation of what would or would not be an alteration of their position, with the verdict which was rendered.

We think the learned judge's direction, "that the plaintiffs, if they seek to take a benefit under the deed, may properly be connected with the manner of its execution," although they did not personally intervene in any way whatever at or before the time of the execution, was a proper direction, if they were mere volunteers, or had not, by reason of the deed, altered in any way their position.

It may not be that they can be charged with the fraud personally, if in truth they had nothing to do with it; but it must be that they should stand or fall by the fraud, of which they desire to take the benefit, unless they had altered their position, or had given some consideration, so as to claim justly the benefit of the deed before they were aware of the fraud. This may be exemplified by the ordinary case of a deed of conveyance, obtained by the fraud of the grantee. The deed is void in his hands; and it is void in the hands of one who takes it without consideration, or who takes it with a knowledge of the fraud; but it is a valid deed in the hands of one who takes it for a good consideration, and in good faith. It is also very clearly explained by the case of *Scholefield v. Templer* (5 Jur. N. S. 619, S. C. 4 DeG. & J. 429), where it is declared that "one, who is innocently

party to a fraud, can derive no benefit from that fraud, where there is no consideration moving from himself." It is not necessary to examine this case in detail, but it is a highly instructive one on this important branch of the law, where the effect of representations is in question, or misrepresentation or fraud is charged, or where persons not concerned or not directly concerned seek to participate in the benefit of a misrepresentation or fraud.

It has been argued that the defendants had not notice of the plaintiff's acceptance of the terms of the deed; but we find no plea raising this issue. The fifth plea is, that the plaintiffs did not demand of the defendants to execute the notes, but this is quite distinct from the question of notice. The declaration, under the general allegation of performance of all things to entitle them to maintain the action, includes sufficiently the giving of notice to the defendants of their acceptance of the terms of the deed; and this is not traversed: *Hurst v. Nottidge* (1 El. & Bl. 99; *Doogood v. Rose* (6 C. B. 132). As to the finding of the issues generally for the defendants, when some of them should clearly have been found for the plaintiffs, that can always be set right by the judge who tried the cause, and no doubt some of them should have been found for the plaintiffs; but that is of no consequence on this motion, as all this can be remedied by the learned judge who tried the cause, who can direct in what manner the issues should be stated as found according to his notes, if the verdict is to stand for the defendants.

But according to the best view which I can form, I think there should be a new trial; for I see no fraud of any kind in fact. But even if there had been fraud, I see nothing to charge these plaintiffs or their agents with it; and as they appear to have given a valid consideration for the benefit of the defendants' deed, I do not see how they can be deprived of the benefit by the fraud of others, assuming, as I have before said, that there was fraud at all.

It does appear, however, to be an exceedingly hard case upon the defendants, and it is not improbable the finding may be the same again as it has been; in which case the plaintiffs may have serious difficulty in again disturbing the

verdict. And I also feel that the plaintiffs have suffered substantial loss, too, by the giving up of all the goods of their debtor which had been assigned for their benefit and the benefit of the other creditors of Ferguson: it is a case in which there is hardship, whichever way the verdict may be rendered.

Rule absolute for new trial.

HALL V. GOSLEE ET AL.

Fi. fa. lands—Seizure—Expiration of writ—Abandonment—Return.

The expiration of a *fi. fa. lands* before the intended day of sale, which has been regularly advertised, does not cause a cessation of the seizure, which the *commencement* of the advertisement is.

In this case, where lands had been advertised under other writs, the plaintiff's writ of *fi. fa.* being at the time in the sheriff's hands,—*Held*, that although the sale under the writs so advertised neither took place nor was adjourned, yet that the plaintiff's writ operated upon the lands under the seizure by such advertisement, and the return of "lands on hand" to this writ after its expiry was, under the circumstances, the only return which could have been made; and further, that the sheriff might have proceeded at the plaintiff's suit without a *venditioni exponas* to sell the lands then in his hands.

Held, also, that the non-adjournment of the sale advertised for 12th September, 1863 (which did not take place), and the publication of an apparently independent notice in the following June, under the plaintiff's writ of *ven. ex.*, did not necessarily and conclusively constitute an abandonment of the seizure, which had been lawfully made under the former writs; although no positive rule could be laid down as to what would constitute an abandonment of lands once seized, this being a matter of fact which must rest very much on intention.

C. S. Patterson, on behalf of the sheriff of the United Counties of Northumberland and Durham, obtained a rule on the plaintiffs and defendants to shew cause why the rule requiring the sheriff to return the writ of *venditioni exponas* and *fieri facias* for the residue should not be set aside, either in the whole or so far as the same relates to the *venditioni exponas*, on the ground that no lands were seized or were seizeable thereunder by the sheriff; that no lands were seized by sheriff Fortune under the original writ of *fi. fa.*, or if seized the same did not come into the hands of the present sheriff; and that the writ being returnable only after execution thereof, and not having been executed, the sheriff could not be ruled to return it.

The facts agreed upon between the plaintiff and the sheriff, and upon which the rule was granted, were in effect, as

follow : the *fi. fa.* against lands in this suit was issued on the 30th of August, 1861, and delivered to sheriff Fortune on the following day, and was renewed on the 14th August, 1862 : the return to it was made by sheriff Fortune on the 29th of August, 1863, "lands on hand" : the *ven. ex.* and *fi. fa.* against lands for residue was issued on the 10th of November, 1863, and was received by sheriff Fortune on the 16th of that month.

There were two writs against lands, at the suit of the Commercial Bank, issued on the 23rd July, 1861, received by sheriff Fortune on the 25th of the same month, renewed on the 27th of June, 1862, and returned by sheriff Fortune, "no lands," on 3rd Sept., 1863, one of which was against both these defendants, the other against one of them only.

On the 5th September, 1863, the Commercial Bank delivered to sheriff Fortune two writs of *alias fi. fa.* against lands, which were renewed on the 30th of August, 1864.

Before the return of "lands on hand" there had been no advertisement of lands by the sheriff in which this cause was named, but an advertisement purporting to be under the two writs of the Commercial Bank was inserted in the "*Cobourg Star*," a newspaper published in Cobourg, on the 17th of June, 1863, giving notice that the defendants lands would be sold on the 12th of September, 1863. This advertisement was continued weekly in the "*Cobourg Star*" until the 5th of September, 1863, and it was published in the *Canada Gazette* on the 25th of July, 1863, and continued until the 12th of September following. No sale, or attempt at sale was made on the 12th of September, 1863, in pursuance of the advertisement, nor was the sale adjourned to any future day.

Sheriff Fortune was superseded in his office on the 9th of March, 1864 : Sheriff Waddell, the present applicant, was appointed sheriff on the 10th of March, 1864.

The plaintiff's writ of *ven. ex.* and *fi. fa.* residue was transferred by sheriff Fortune to the present sheriff on the 9th May, 1864, without any return of what had been done thereon, together with the two writs of *alias fi. fa.* at the suit of the Commercial Bank.

The plaintiff's attorney in this case sent to Sheriff Waddell on the 30th of May, 1864, a list of lands to be advertised under the writ of *ven. ex.*, with money to pay for the advertisements; upon which the sheriff inserted in the *Canada Gazette*, on the 18th June, 1864, and also in the "*Cobourg Star*," the said lands, being those before advertised at the suit of the Commercial Bank, to be sold on the 10th September, 1864, under the *ven. ex.*, but not naming any other writ. These advertisements were regularly continued until the 10th of September: the sale was adjourned until the 39th of November, 1864.

On the 29th of August, 1864, the sheriff advertised the same lands, under the *alias* writs of the Commercial Bank, for sale on the 26th of November; and on the 16th day of September following, a rule to return the plaintiff's writ was served on the sheriff on behalf of the plaintiff.

English for the plaintiff shewed cause.—The advertisement in the *Star*, the local newspaper, while the plaintiff's writ was in force, and while also the Commercial Bank writs were in force, was a sufficient seizure of the lands, although no advertisement was published in the *Gazette* until after the Commercial Bank writs had expired. This advertisement in the *Star*, although it professed to be at the suit only of the Commercial Bank writs, operated as well to the benefit of all other writs which the sheriff had then in his hands to be executed: *Bank of Montreal v. Munro*, 23 U. C. Q. B. 419. The advertisement, therefore, was in law a seizure in fact made under the plaintiff's writ. The subsequent publication of the 25th July, 1863, being made while the plaintiff's writ was still in force, was consequently available to the plaintiff's writ, although it professed to be only a publication under the Commercial Bank writs, and although these writs had then run out: *Rowe v. Jarvis*, 13 U. C. C. P. 495. Any act, such as taking a list of lands by way of seizure, is a sufficient seizure: *Doe d. Tiffany v. Miller*, 6 U. C. Q. B. 426; and the C. L. P. Act, sec. 268, has made no change in the law in this respect: it does declare what acts shall be a seizure, but it does not confine it to these acts only, nor does it assume to alter the law as it stood before. The writ was properly assigned by the old to the new sheriff, which the

latter was bound to complete, and the plaintiff was entitled to rule the sheriff to return the writ.

C. S. Patterson for the sheriff.—The plaintiff's writ was never properly acted on by the old sheriff. There can be no seizure of lands now but by an advertisement in the *Gazette*, and all the advertisements should be completed before the expiry of the writ, which was not the case as to the plaintiff's writ. And so, also, as the advertisement is the seizure, the discontinuance of the advertisement is the abandonment of the seizure: there should be regular adjournments to preserve the lands in the custody of the law: *McKee v. Woodruff*, 13 U. C. C. P. 583; *Muir v. Munro*, 23 U. C. Q. B. 139; *Impey on the Office of Sheriff Edn.* 1817, fo. 90. The present sheriff should not have been ruled: *The King v. The Sheriff of Cornwall*, 1 T. R. 552.

A. WILSON, J.—The plaintiff's writ of *fiery facias* against lands, which issued on the 30th of August, 1861, was in full force by renewal until the 13th of August, 1863. The defendants lands were advertised as seized by publication in a local paper on the 17th of June, 1863, and in the *Gazette* on the 25th of July, 1863: these advertisements did not specify the plaintiff's writ, but described the seizure as having been made upon the writs only of the Commercial Bank. This latter circumstance has been decided to be of no consequence, for, as it is a seizure, it is a seizure under all the writs according to their priority, which the sheriff has then in his hands to be executed. This may be, perhaps, on the principle, that it is not what the sheriff "declares, but the authority which he has, that is his justification": *Crowther v. Ramsbottom*, 7 T. R. 654.

The advertisements were first made while the plaintiff's writ of *fiery facias* was in full operation: the advertisements were, therefore, in law a seizure under his writ.

The former sheriff, then, on the 29th August, 1863, a few days only after the expiry of the plaintiff's writ of *fiery facias*, returned the writ that he had "lands on hand," &c. This, it is contended, he could not do, in addition to the fact that he had not advertised in the name of this writ specially, because all the necessary advertisements had not been made

before the time the writ had expired ; but we think there is no force in this objection : a seizure of goods made at the last moment of the operation of a writ against goods would be a veiled inception of executions to enable the sheriff to complete the writ after it had expired. It is not necessary that all the advertisements should have been completed of a seizure and intended sale of lands before it could be held that these lands were seized. There are numberless answers to the validity of this objection ; but the statute itself is very plainly expressed upon this point : “ The advertisement
* * * during the currency of the writ * * * shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writs has become returnable.” It is the “ commencement ” of seizure that is the important act, for that commencement in the *seizure* : after that the advertisement is continued, not for the purpose of seizure but of sale, and after that, by reason of such commencement, the execution may be completed by sale, and conveyance, “ after the writ has become returnable.”

We see no objection to the return which the former sheriff has made to this writ of “ lands on hand,” and we see no other return upon these facts which he could properly have made to it.

The plaintiff upon this return issued the *venditioni exponas* and *fi. fa.* for residue, on the 10th of November, 1863, and delivered it to the sheriff on the 16th of the same month. In strictness it was not necessary, for the mere purpose of a sale of the lands, to issue the *venditionis exponas* at all, as the sheriff could, as well without it as with it, have proceeded to sell the lands then in his hands.

The day of sale, which was fixed for the 12th September, 1863, was allowed to pass without a sale, or an attempt to sell without any adjournment being made of the sale ; and so matters remained until the *ven. ex.* was transferred by the old to the new sheriff, on the 9th May, 1864, and until the new sheriff, on the 18th June thereafter, advertised the lands for sale, under the plaintiff's writ of *ven. ex.*, on the 10th September following : and it is contended that because no sale was made on the 12th September, 1863, the day

appointed, and no adjournment was made then of any intended sale, that the whole proceeding by advertisement, and the first result and effects of them, fell utterly through—that the seizure ceased, and the lands were in effect abandoned; but that, as we think, is to confound the preliminaries of a sale with the act, fact, and object of a seizure.

The seizure has been made or has been evidenced by the advertisement; it does not cease to be less a seizure because the sheriff has accidentally omitted to continue the notice that he will sell the lands on a particular day, or because the printer has forgotten to publish it, or because the newspaper or Gazette may, from fire, failure, civil commotion, or any other of the many causes that might be mentioned, been suspended or destroyed. This would lead to the most serious and obvious evils, and would in some of these instances be making superior agency and inevitable accident the offence, rather than the excuse, of the person who was alone injured by it.

The difficulty, no doubt, arises from the fact that the seizure of lands cannot be so visibly and tangibly made as of goods, nor so visibly and tangibly abandoned; and although no positive rule can be laid down as to what shall constitute an abandonment of lands once seized, for it must be a matter of fact arising very much from intention, we are quite satisfied that the non-adjournment of the intended sale on the 12th September, 1863, and the publication of a new and apparently unconnected notice with the former one—made in the June afterwards, are not such facts which constitute necessarily and conclusively an abandonment of the seizure, which was lawfully made under the *fi. fa.*

The plaintiff's writ, it is admitted, was duly transferred to the present sheriff, who advertised under it the lands which has been before seized by his predecessor, as he was justified in doing under section 269 of the act. We do not see why, then, the plaintiff may not call upon the sheriff to return the *ven. ex.*

The present rule should, therefore, be discharged with costs.

Rule discharged with costs.

BANK OF MONTREAL V. TAYLOR.

Fi. fa. lauds—Expiration—Renewal—Priority of writs.

The day of the *teste* of a writ of *fi. fa.* is *inclusive*; so that a writ issued on the 16th May, 1861, will expire on the 15th May, 1862.

In this case, *Held*, that the writ which had issued 27th July, 1861; and had been renewed 22nd July, 1862, was entitled to prevail over a writ issued on the 16th May, 1861, but not renewed until the 16th May, 1862.

The law, as laid down in *Hamilton v. Beardmore* (7 Gr. Chy. Rs. 286). that the registration of a judgment recovered against the personal representative of a deceased person, does not bind lands which were of the deceased; and also, that the omission to issue a *fi fa.* lands within a year from the registration of a judgment, prevents the judgment from operating as a lien upon the land from the date of registry,—recognized and applied.

This was a special case, in which the question for the opinion of the court was, whether the plaintiffs were entitled to be paid the amount of the monies realized from the sale of the lands, or any part thereof; and if only a part, what part of such monies.

The facts stated besides those which are condensed in the following schedule are very few.

Benjamin P. Davy was the principal debtor. He died on or about the 9th March, 1860, seised in fee of certain lands. Administration, with the will annexed, was granted to Cinderella Davy.

The defendant was appointed sheriff of the county of Hastings on the 23rd March, 1863, in the room of Sheriff Moodie, who had for several years before that time been sheriff of the county.

No other seizure of the lands was ever made than in the manner and at the time or times mentioned in or by the notices of advertisement and advertisements of sale.

By an advertisement, dated the 4th June, 1862, and published in the *Gazette* on the 7th of the same month, the sheriff gave notice that he would sell the east part of No. 26, on Pinnacle street, and water lot No. 10, on the west side of Front street, in Belleville, and the south-west part of lot No. 32, in the first concession of the township of Sydney, containing one hundred acres, on the 13th September, 1862, under the several writs against Davy's lands then in his hands.

This sale was postponed from time to time until the 9th May, 1863. By an advertisement, dated the 13th January,

1863, the sheriff gave notice that he would sell the above lands, and also No. 26, on the west side of Church street, the one-eighth of an acre in Baldwin ward, and No. 21 on the east side of Grove street, in Belleville, on the 25th April following, under the several writs against Davy's lands then in his hands.

This sale was postponed till the 9th May, 1863, the same day of adjournment under the former advertisement. The sale did take place on that day, the net proceeds of which, applicable to the executions, were \$3,894 70.

It was stated that J. Perry, on the 14th May, 1861, filed a bill in Chancery upon his judgment against the administratrix and others, claiming that his judgment was a lien on the lands of Davy, and praying that the lands might be sold to satisfy his claim. The bill, however, was not served, nor were any proceedings taken thereon, nor had any notice been given of its having been abandoned. It was also stated that William F. Grant, on the 17th May, 1861, filed a bill in Chancery upon his judgment for the like purpose, but that the bill had not been prosecuted.

SCHEDULE.

No.	Plaintiff.	Defendant.	Amount of Judgment.	Registr'n of Judgm't	Fi. fa. goods given to Sheriff.	Returned.	Fi. fa. lands given to Sheriff.	Renewed.	Returned.	Further process.
1	John Lewis.....	Administrat'x.	£131 16	1 Nov. 27, '60	24th Jan., 1861...	(Sameday, N.B. at request of plain-tiff's attorney....)	Feb. 2, '61.	.....	{ Apr 7, '62, lands on hand to is; no lands as to residue	{ Ven. ex. and fi. fa. residue given to sheriff June 3, '62 }
2	John H. Perry.....	Administrat'x.	£1,215 5 10	Oct. 4, '60	26th Oct., 1860....	Never returned.....	May 16, '61.	.....	27th April. 1863.....	{ Al fi. fa. given to sheriff April 27, '63 }
3	Francis McAnnaney	Administrat'x.	£122 2 10	May 2, '61	23rd April, 1861.	{ May 16, '61, N.B. at request of plaintiff's attor'y }	May 16, '61	{ May 16, '62 May 15, '63 }		
4	Commercial Bank...	Davy pers'n'l'y	£4,831 14 11	Aug. 1, '59	20th Sept., 1859.	9th Aug., 1861, N.B..	Aug. 30, '61			
5	W. F. Peterson.....	Administrat'x.	\$1,301 65	.....	{ Issued June 24, 1861, but never given to sheriff. }	.....	{ 11 a.m., Aug. 30, 1861. }			
6	Moffatt and others...	Administrat'x.	£290 19 0	Oct. 1, '60	{ Issued Sept. 28, 1860, but never given to sheriff. }	.....	{ 11 a.m., Aug. 30, 1861. }			
7	William F. Grant....	Davy pers'n'l'y	\$1,154 80	Nov. 26, '59	24th Nov., 1859..	Never returned.....				
	Judg't revived ag'nst	Administrat'x.	.....	.....	30th Aug., 1861....	Same day, N.B.....	Aug. 31, '61	Aug. 30, '62.		
8	Bank of Montreal....	Administrat'x.	\$9,663 23	.....	25th July, 1861....	Same day, N.B.....	July 27, '61	July 22, '62.	{ Nov. 17, '61, \$3,894 70c. applicable to prior writs and no other lands. }	

Read, Q.C., with him *Lazier*, on behalf of the sheriff.—None of the registrations of judgments recovered against the administratrix are of any avail to the respective plaintiffs on these judgments: *Hamilton v. Beardmore*, 7 Grant Chy. Rs. 286; Con. Stats. U. C. ch. 89, sec. 49; and as to the two judgments which were recovered against Davy in his lifetime, neither of them, although registered, had been followed up by an execution against lands within one year from the date of registration: *Kerr v. Amsden*. 2 Err. & App. U. C. 446; *Rowe v. Jarvis*, 13 U. C. C. P. 495. The priorities, therefore, must be adjusted between the different creditors according to their writs, without regard to the question of registration. The *fi. fa.* against lands in judgment No. 1, which was placed in the sheriff's hands on the 2nd February, 1861, expired before anything was done upon it, and the claim of that creditor must depend upon his *fi. fa.* for the residue against lands delivered to the sheriff on the 3rd June, 1862. The *fi. fa.* against lands in judgment No. 2, if not void for want of a return of no goods to the *fi. fa.* against goods, took rank, at the earliest, from the date of the delivery of the *alias fi. fa.* to the sheriff on the 27th April, 1863. The *fi. fa.* against lands in judgment No. 3, took rank either from the 16th May, 1861, when it was delivered to the sheriff, or had no place among these writs at all; and the question whether it took rank on the 16th May, 1861, depends upon the fact whether the renewal made on the 16th May, 1862, was made in time, or whether it should not have been made on the 15th instead of the 16th: C. L. P. Act, sec. 249; *Sutherland v. Buchanan*, 9 Grant, 135; *Ammerman v. Digges*, 12 Ir. C. L. Rs. App. 1; *Vrooman v. Shuert*, 2 U. C. Pr. Rep. 122. The *fi. fa.* against lands in judgment No. 4 took effect from the 30th August, 1861; in judgments Nos. 5 and 6, from the same date, if, indeed, the writ in either case was valid at all, since no *fi. fa. against goods* was ever delivered to the sheriff; in judgment No. 7, from the 31st August, 1861; and the *fi. fa.* against lands in judgment No. 8 took effect from the 28th July, 1861; the result being, that the plaintiffs' execution (No. 8) appears to be entitled to precedence over all the others, except No. 3, and over No. 3 also, if

the renewal of that writ on the 16th May, 1862, was a day too late.

MacLennan, for the plaintiffs.—The statute declares that the writ against lands shall be in force for a year ; but if the defendant's contention be correct, it would be in force for a year *and a day*. McAnnaney's writ, being tested on the 16th May, 1861, expired on the 15th May, 1862 : the renewal of it the day after was, therefore, inoperative ; it was thenceforward a spent writ, and nothing could be done under it : *Gardiner v. Juson*, 2 Err. & App. Rs. U. C. 188. An infant attains majority not upon the twenty-first anniversary of his birth-day, but upon the day before it, or the last day of his twenty-first year : 2 Steph. Com. 315 ; 1 Christian's Bl. Com. 463.

Richards, C. J., referred to *Phillips v. Merritt*, 2 U. C. Pr. Rep. 233, and to other decisions in the volume on the same point.

A. WILSON, J., delivered the judgment of the court.

We must take it to be settled law, that a registered judgment not followed by an execution against lands within one year of the registration, is of no avail to bind the land from the date of the registry ; and we entertain no doubt that the registration of a judgment recovered against a personal representative of a deceased person, is of no effect to bind the lands which were of the deceased : the case of *Hamilton v. Beardmore* (7 Grant, 286), referred to, and secs. 48 & 49 of ch. 89, of the Consolidated Statutes of Upper Canada, clearly show this.

It is, therefore, apparent, upon a comparison of the dates of the different writs, that the case does resolve itself into a question between McAnnaney's writ and the writ of the plaintiffs. The plaintiffs will be entitled to recover the whole of the net proceeds from the sheriff, if McAnnaney's writ were not renewed in time ; or the amount of the net proceeds less the claim of McAnnaney, if his writ were renewed in time.

The only question, then, is, whether a *fi. fa.* delivered to the sheriff on the same day it is sued out, on the 16th May, 1861, may be continued by a renewal of it made on the 16th

May, 1862 ; or, whether such renewal should not have been made at the latest on the 15th May, 1862.

The court was informed that two others of the above creditors beside the plaintiff had brought actions against the sheriff to determine the same questions which have been raised in this case. The court, however, simply determines these plaintiffs' rights as against this defendant upon the facts stated, without considering what the rights of the other creditors may be if they should hereafter be before the court.

The section of the Common Law Procedure Act (249) referred to provides, that, except writs of *ca. sa.*, every writ of execution shall bear date and be tested on the day on which it is issued, and "shall remain in force for one year from the *teste* (and no longer if unexecuted), unless renewed ; but such writ may at any time before its expiration* be renewed by the party issuing it for one year from the date of such renewal." The 342nd section of the act then provides that, "unless otherwise expressed, the first and last days of all periods of time limited by this act or by any rules or orders of court for the regulation of practice, shall be inclusive."

Under this last section, as without it, we should have thought the day of the *teste* was to be reckoned as part of the year, because no doubt the sheriff could, if it had been delivered to him on that day, have acted at once upon it, without waiting till the next day ; and so, also, if the plaintiff or defendant had died upon that day, the writ so sued out would have been held to have been issued in time, and no *sci. fa.* or writ of revivor would have been required before issuing an execution. The rule is, also, that the issuing of an execution being a judicial act shall, in contemplation of law, be deemed to have taken place at the earliest moment of that day : *Wright v. Mills* (4 H. & N. 488). The commencement of the year is, therefore, to be computed upon or from the 16th day of May, 1861 ; for we look upon the word "from" as inclusive of the day in this case, the general rule being, that it may be either inclusive or exclu-

* "And so from time to time during the continuance of the renewed writ," are the words added to this section by the 27 Vic. ch. 13, sec. 2, and to be *thereafter* read as constituting part of this act.

sive according to the circumstances: *Wilkinson v. Gaston* (10 Jur. 804, S. C. 9 Q. B. 137). Thus in *Pugh v. The Duke of Leeds* (Cowp. 714), it was held to be inclusive of the day to avoid a forfeiture; and in *Lyster v. Garland* (15 Ves. 248), it was held to be exclusive of the day to prevent the failure of a bequest.

The 16th May, 1861, being the first day on which the writ was in force, when was the last day that it remained in force under the words, "for one year from the teste?" or, on what day at latest might it be renewed "before its expiration?" *Prima facie*, the end of that year must be the 15th May, 1862, otherwise there would be two sixteenth days of May in the one year.

It often happens that the time may begin in computation from one day, and in interest from another; but in this case the interest began on the 16th May, 1861, corresponding with the time of computation.

In leases it has been decided that the anniversary of the day on which the lease commenced is included in the time; but this decision rests upon the special ground of "general understanding," also, because if it were otherwise "the last day on which rent is almost uniformly made payable would be posterior to the lease." *Ackland v. Lutley* (9 A. & E. 879).

It is singular that the common legal expression of "a year and a day," should commonly be spoken of as merely a year. In the 9th edition of Tidd's Practice 1102, for instance, in referring to the writ of *sci. fa.* to revive a judgment, it is said, "And first, of the *scire facias* after a year and a day. At common law, in real actions, when land was recovered the demandant, after the year, might have taken out a *scire facias*," &c. "Besides, in real actions, if execution was not sued within the year," &c. "But if the plaintiff, after he had obtained judgment in a personal action, had lain by and taken no process of execution within the year," &c., therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, &c. To remedy this, the statute of Westminster 2 [13 Edw. I.] Stat. 1, c. 45, gave a *scire facias* to the plaintiff, in a personal action, to revive the judgment when he had omitted to sue out execution

within the year after judgment was obtained." See also Arch. Pr. 11th ed. 1113, note (*h*). In 4 Bl. Com. 315, 17th ed. by Christian, it is said, that all appeals of death must be served within a *year and a day* after the completion of the felony, which seems to be only declaratory of the old common law, and reference is then made to the Gothic constitutions, wherein "*intra annum*" is the period given. In Crabb's Law of Real Property, secs. 666-7-8, it is also so treated. In Hawk. P. C., book 2, ch. 23, sec. 34, folio edition, it is said: "It seems that the *year and a day* in any of the cases above mentioned are to be computed from the beginning of the day on which the receipt or death, &c., happened, and not from the precise minute or hour, because regularly the law makes no fraction of a day, and, therefore, if the party die at any time the first day of January, the *year* shall end the first day of January following."

There are many other illustrations of the same kind, which lead to the conclusion that we should have formed, if we had not found it expressly stated in 3 Chitty's General Practice, 107, that "the day was probably added by our ancestors to remove any doubt as to the completion of the year, by inclusive or exclusive computation of the first or last day." The same reason is also given in the 4th American Edition of Cruise's Digest, in note (10) fo. 5^o, where, it is said, "The period of a year and a day, which is frequently alluded to in the old books seems to mean nothing more than a full year, and is now regarded only as one of the antiquities of legal learning."

We think, then, that so far as the legal term of "a year and day" could have any bearing, it is against the inclusion in this case of the 16th of May, 1862, as a part of the year which began on the 16th of May, 1861.

It is no doubt the fact that the writ in question remained in force until the last moment of the 15th of May, 1862, and that the renewal which was made (if valid) took effect from the first moment of the following day, leaving no portion of time whatever between the two acts, so that the latter act is (if valid) strictly a prolongation or renewal of the term of the writ; but, notwithstanding this, we cannot say that in the earliest conceivable moment of the 16th of May, 1862,

the writ which expired on the last instant of the preceding day was ever in force. We cannot presume that the renewal was made on the last moment of the 15th May, although something of the kind appears to have been done in two cases referred to in Cowp. 720. We prefer relying upon plain rules, when we can discover them, unless some invincible rule leads us the other way; and upon this principle we cannot say that the writ, which took effect in interest upon the 16th May, 1861, and was to remain in force for one year from that time, did remain longer in force than the last period of the 15th May, 1862, the same not having been renewed before the period of its expiration. The case of *Russell v. Ledsam* (14 M. & W. 574), we think, sustains this construction. The letters patent were dated 26th February, 1825, to be in force "for the term of fourteen years from the date thereof," of which a renewal was granted by other letters patent, dated the 26th February, 1839; and it was argued that the renewal was valid, because it was granted after the original letters had expired. Parke, B., in giving the judgment of the court, said: "The question is, whether the day of the date of the first letters patent was inclusive or exclusive. * * * In this case the question is, when the term given by the patent commences. * * * It was asked by Mr. Kelly, whether, if there had been an imitation of the invention on the day the patent was dated, it would have been an infringement of it; and we have no doubt that the answer ought to be that it would; and if so, the day of the date would be included, and the patent would expire at midnight on the 25th February, 1839, for the law never takes notice of the fraction of a day, except where there are conflicting rights between subjects." See *Williams v. Nash* (5 Jur. N. S. 696.)

The rule will therefore be, that judgment be entered for the plaintiffs for the net proceeds of the monies levied, without interest, as interest forms no part of the case.

Judgment for the plaintiffs accordingly.

THE QUEEN v. McILROY.

Conviction for wilfully and maliciously shooting with intent, &c.—New trial refused.

On motion for a new trial by a prisoner convicted of wilfully and maliciously shooting with intent to kill and murder, *Held*, following the principle laid down in *The Queen v. Chubbs* (14 U. C. C. P. 32), that the court will not, in criminal cases, grant a new trial, unless the verdict is clearly wrong; even though the evidence on which a prisoner is convicted would equally justify his acquittal; for the jury are to judge of the preponderance of the evidence, and their finding will not be disturbed. *Held*, also, on the authority of *Scott v. Scott* (9 L. T. N. S. 456), that the discovery of new evidence, which amounts to nothing more than *corroborative* testimony, is no ground for granting a new trial.

The prisoner was indicted, at the last assizes held at Hamilton for the county of Wentworth, for feloniously, wilfully, and of malice aforethought, shooting at, with intent to kill, one Thomas Chilton Mewburn.

The jury found the prisoner guilty. The Crown, at the request of the prisoner, did not move for judgment, in order that he might have an opportunity of applying for a new trial.

McKelcan obtained a rule *nisi* accordingly, calling upon the Attorney-General to shew cause why the verdict of guilty should not be set aside, and a new trial granted, upon the ground, that the verdict was contrary to law and evidence, and to the weight of evidence; and upon the ground of surprise in the evidence of Homer P. Brown, in stating that before the train on which the prisoner was arrived at Woodstock, he went through the cars and looked for said McIlroy, and could not find him; and for the discovery of new evidence since the said trial, which showed clearly that said McIlroy did proceed all the way to Woodstock on the evening of the 4th day of April last, and was in Woodstock at the time the felony charged against him was committed at Hamilton; and on grounds disclosed in affidavits filed.

It is not considered necessary to insert the evidence: the case is merely reported as a further illustration of the principle by which the court is governed, in granting or refusing new trials in criminal cases.

R. A. Harrison, for the Attorney-General, shewed cause. He cited *The Queen v. Crozier*, 7 U. C. Q. B. 275; *The Queen v. Chubbs*, 14 U. C. C. P. 38, 41; *The Queen v. Beckwith*, 8 U. C. C. P. 274; *Fawcett v. Mothersell*, 14 U. C. C. P. 106, 110; *The Queen v. Greenwood*, 23 U. C. Q. B. 255.

McKelcan, contra.

J. WILSON, J., delivered the judgment of the court.

It can scarcely be said that the verdict is contrary to law and evidence, for there is direct testimony that the prisoner was the person who committed the offence. The principle laid down in *The Queen v. Chubbs* (14 U. C. C. P. 32) is, that the court will not grant a new trial, unless they see clearly that the verdict is wrong. Here there was evidence, as there was in that case, to warrant the jury finding either way; but it is the province of the jury to say on which side it preponderates. Here the positive evidence is, that the prisoner was the man who, about half-past four o'clock on the morning of the 5th April last, had broken into the dwelling-house of Mr. Newburn, in the city of Hamilton, and fired at him with a loaded pistol, when distant from him twelve or fourteen feet. For defence the prisoner says that he was not the man, because, from all the facts proved, it was, to be inferred that at the time the prosecutor was fired at, he (the prisoner) was in bed at Rice's hotel in Woodstock. If the prosecutor was not mistaken, the prisoner was the man: if the witnesses for the defence were not mistaken, the probabilities are that the prisoner was not the man. In this general view of the case, can the court say that the weight of evidence was so decidedly in favour of the prisoner as to enable us to say the jury were wrong in adopting that view of it which was adverse to him? We do not see on what principle we can disturb the verdict on the grounds of being contrary to law and evidence and the weight of evidence.

The next ground is, that of surprise in the evidence of Brown, in stating that before the train in which the prisoner was, had arrived at Woodstock, he went through the cars and looked for McIlroy, and could not find him. Brown's evidence was, "I saw him on the cars as far as Dundas at any rate, but he did not go *past Harrisburgh*: can't say he went past Dundas. I went through the cars and looked for him after he left his seat in the cars, and could not find him." Brown's evidence is explicit on two points: first, that on leaving Hamilton the prisoner occupied a seat in the car on which Brown was; secondly, that he left it, and after this Brown went through the cars and looked for him, but could not find him. The prisoner could have told us where he

went after he left the seat he first occupied in the cars, and where he was, if out of sight, when Brown went through them; but in his affidavit no account is given of the very circumstance which is stated as the ground of surprise. Brown was a man of good standing, who is not said to have consealed anything he knew, or misled the prisoner in regard to the evidence he would give; but his evidence was consistent with the assumption that the prisoner did not go to Woodstock on that train, which supports the case for the Crown.

The next ground is the discovery of new evidence since the trial, which, it is said, shows clearly, "that said McIlroy did proceed all the way to Woodstock on the evening of the 4th day of April last, and was in Woodstock at the time the felony charged against him was committed."

The new evidence is that of one Martin Derrick, who is said to have left Toronto with McIlroy on Monday the 4th and travelled with him all the way to Woodstock, where they arrived on the evening of the same day; and, that the prisoner and his counsel have been informed and believe that one Montrose will prove that he saw the prisoner get of the train on its arrival at Woodstock.

In what view the testimony of Derrick is called the discovery of new evidence since the trial, we do not see. If this man was the companion of McIlroy on that journey, as we are led to understand, he must have known that his evidence was material on his defence. In a civil case, is it open for either party to proceed with a trial, knowing that a material witness is absent, taking the chances of success, and in case of disappointment to say, "I have since the trial discovered new evidence?" It is not new evidence, for the prisoner knew of it, and Derrick says he has been in Detroit for some months, and no good reason is shewn for his not being produced. This was, rather, evidence not produced, which, as far as we see, was within the prisoner's reach at the time of the trial. True, the prisoner says he could not find him, and his wife says she has continually been making enquiries as to the whereabouts, as she terms it, of Derrick, and that on the 11th October last, she went to Detroit, where she was informed he was, but after making diligent search, she

could not find him. Derrick himself says he is now, and has been for some months past, residing in the city of Detroit. This man does not represent himself as a stranger to the prisoner, but rather as his companion on the occasion: he says they left Toronto together, and arrived at Woodstock together, where they met Rice, at whose hotel they stopped. Rice was a witness for prisoner, and stated these circumstances, and the fact of the prisoner stopping there.

The new evidence is that of Montrose. The prisoner and his attorney tell us they have been informed and believe he will prove he saw the prisoner get off the train at Woodstock, on its arrival there, on the 4th April, the occasion spoken of by Rice at the trial. Montrose does not himself tell us what he can prove if he were called; but if he were, what is stated he can prove is but in corroboration of a fact which has already been attempted to be proved. The new evidence, admitted to its fullest extent, would not prove what is alleged in the rule, namely, that the prisoner was in Woodstock at the time the felony charged against him was committed. It is not pretended that either Derrick or Montrose can say where the prisoner was at about half-past four o'clock on Tuesday morning. The distance between Hamilton and Woodstock is said to be forty-seven and a quarter miles by rail. Supposing it is admitted that the prisoner was last seen in Woodstock at ten o'clock on Monday night, and next seen about nine o'clock on Tuesday morning, is it shown that at half-past four he was not in Hamilton? All that is alleged, therefore, is but corroborative evidence, not new. In *Scott v. Scott* (9 L. T. N. S. 456), alluded to in *Fawcett v. Mothersell* (14 U. C. C. P. 104), it is said, "It has never been the habit of Westminster Hall to grant new trials, on the simple grounds that the party can make some case stronger by corroborating testimony (even though newly discovered), if another trial were allowed; and if it were otherwise, there are few cases that would not be tried a second time."

In the argument it was pressed strongly that McIlroy had sore eyes; but, as the prosecutor describes him, he had not. The evidence of the Crown and the prisoner's witnesses leave it uncertain whether his eyes were in such a state of soreness as to attract observation. So, too, it was pressed

that Knox and his clerk would not swear whether it was the 4th, 5th, or 6th of April the money was lent; and Kenny, who made the entry, would not swear, apart from the entry, that the money was paid or entered on the 5th April. Men not accustomed to make written entries of their transactions rely on the simple act of memory, and very frequently can give no reason for their conviction of the certainty with which they speak. Other men, accustomed to make entries, do not profess to have any recollection of an event as a simple act of memory: they can only say that in the ordinary management of their affairs they make certain entries, and do not charge their memory with the time or the transaction, except as shown by entries in their books, and they cannot, and do not say, what they did or when they did it, apart from these entries. The recollection of a particular event is one thing; the time when it occurred is quite another: the event may not be in the least forgotten; the time when, may. Now, in regard to the question of time, in speaking of when an event occurred six months afterwards, whether is most reliance to be placed on him who spoke of it as a mere act of memory, or on him who had entered it in his book as one of the transactions of the day on which it happened, neither of them having any personal concern in the matter, or having any reason to suppose that the time when the thing occurred would ever become a question of importance? But the counsel urged upon us, that no dependence ought to be placed on the testimony of the witness Kenny, because he would not swear, apart from the entry, that the thing he spoke of happened on that day.

The principles which guided this court in *The Queen v. Chubbs*, apply peculiarly to this case. In that case, as in this, there was evidence which might, without imputation, have warranted the jury in finding the prisoner not guilty; but in both there was evidence which fully warranted the conviction.

We have anxiously considered the evidence, and what has been urged as grounds for granting the present motion: we cannot say we are not satisfied with the conviction, and we fail to discover grounds which, on principle or authority, would justify us in granting the prisoner a new trial.

Rule discharged.

SOULES v. DONOVAN.

Fi. fa.—Enrollment—Secondary evidence—Practice.

It is not *necessary* that a writ of *fi. fa.*, which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence; and if lost and unenrolled, secondary evidence may be given of it.

Held, also, that the issuing of the writ of execution may be entered on the roll at any time, though no return may then have been made to it.

A new trial having been granted in this cause, it was again taken down to trial before A. Wilson, J., at the last assizes for the county of Simcoe.

At the trial the *fi. fa.* against lands, in a suit in which the lands were sold by the late sheriff of the Home District, was proven by parol evidence. The proper search for the writ had been made in all places where it could reasonably have been expected to be found. It was objected for the defendant, that the issuing of a *fi. fa.* against lands and the contents of the writ could only be properly proven in the same way as any other record; that the record should contain a statement of the prayer of the writ, and that it was granted to the plaintiff in the action, and when it was returnable; that in the event of the loss of the writ, the proper way to prove it was by an exemplification of the judgment roll containing the award of the writ, or by a sworn copy of the roll.

Leave was given to the defendant to move to enter a nonsuit on the point, and a verdict was found for the plaintiff.

McCarthy obtained a rule *nisi*, pursuant to leave reserved, to enter a nonsuit or a verdict for the defendant.

McMichael shewed cause.—Roscoe's *Nisi Prius* (10th ed. 96) is an express authority in favor of the plaintiff. The argument against the secondary evidence being received is based on the assumption that the writ is enrolled, and becomes a matter of record as soon as issued, and can only be properly proven in the same way as any other record; but *Hodgkinson v. Whalley*, (2 C. & Jer. 86, S. C. 2 Tyr. 174) shows it is not the practice to enroll the writs until something is done under them, and that two different writs of execution may issue at the same time, but both cannot be enrolled: therefore, the assumption that they are or can be properly assumed to be enrolled when issued, is fallacious.

McCarthy, contra.—The distinction between mesne and final process has been overlooked. Mesne process often issued out of another court, and could not be enrolled until returned, and, therefore, could not be proved by its production until returned and enrolled. Buller's *Nisi Prius* (234) is the authority generally referred to, but that is based on the case in Sayer's Reports (*Whitmore v. Rooke*, 299), which does not warrant the conclusion drawn from it in Buller's *Nisi Prius*. The proper practice is to put the award of execution on the roll: Chitty's Forms, 319, ed. of 1862.

He also pointed out the distinction between elegits and other writs of execution, and referred to *Ramsbottom v. Buckhurst*, 2 M. & S. 565; *Casseldine v. Munday*, 2 Dowl. 169; *McCollum v. Davis*, 8 U. C. Q. B. 150.

RICHARDS, C. J., delivered the judgment of the court.

In Roscoe on Evidence, it is laid down that a writ must be proved by a copy of the record of it after its return, and this is said to be necessary whenever it is the gist of the action (and Buller's *Nisi Prius*, p. 234, is given as authority on this point), otherwise the writ itself may be produced, or secondary evidence given, when its non-production is accounted for: Roscoe, 8th ed. 89, 10th ed. 96. Taylor on Evidence (2nd ed. 1221) states, "Writs and warrants, until they are returned, must be proved by actual production, though after their return they become matters of record, and are consequently provable by copies." Buller's *Nisi Prius*, at p. 234, is also given as authority for this. In a note is further added, "If the writ is the gist of the action, it must be returned." In Starkie on Evidence (4th ed. p. 437-8) it is stated: "The writ either has been returned or it has not: if it has been returned, it is a record, and should be proved in the same manner as any other record; if the writ has not been returned, the original should be produced. A writ, if not returned, is proved by the mere production: when it has been returned, it may be proved by an examined copy. * * When the writ is a mere matter of inducement, it may be proved by the production of the writ itself, without a copy of the record; for possibly it may not have been returned, and then it is no record; but where a record is the gist of

the action, a copy from the record is necessary, because that is the best evidence ;” Buller’s N. P. 234, and Gilbert’s Law of Evidence, 34, are referred to. At page 272 of the same edition of Starkie, it is laid down, “ So, in trover, if a *feri facias* or *venditioni exponas* be lost, other evidence is admissible ; so also if a recovery in ancient demense be lost, and the roll cannot be found, it may be proved by the oral testimony of witnesses, when the possession has gone accordingly ;” Hardres, 323, Aleyn, 18, are referred to. In Phillips on Evidence (8th ed. p. 617) it is said, “ so, in an action of trover, secondary evidence has been admitted of a *feri facias* and a *venditioni exponas* proved to have been lost,” and the same authority is referred to. The mode in which the writ of *fi. fa.* is entered on the record seems to be as follows, after the entry of the judgment: “ Afterwards, that is to say, on the — day of —, the plaintiff comes here into court, by his attorney aforesaid, and prays the writ of the said lady the Queen of *feri facias* to be directed to the sheriff of —, commanding him that of the goods and chattels of the defendant in his baliwick he cause to be made the damages aforesaid * * * and it is granted to him, returnable before our lady the Queen immediately after the execution thereof.” The same day is given to the plaintiff, at the same place: Chitty’s Forms, 6th ed. 175, 9th ed. 319. If the return of the sheriff is to be enrolled, the entry proceeds ; “ And after vards, to wit, on —, before our said lady the Queen, at Westminster, comes the plaintiff, by his attorney aforesaid, and the sheriff, to wit, S. S., sheriff of the county aforesaid, thereupon returns to our said lady the Queen,” &c., &c. In *Hodgkinson v. Whalley* (2 C. & J. 86, S. C. 2 Tyr. 175), approved of in *Andrews v. Saunderson* (1 H. N. 725), Bayley B., said: “ There is no doubt that a *fi. fa.* and *ca. sa.* may issue together and be concurrent ; for if nothing is done on either, no award of execution is entered on the roll : but if one is executed, a return of that must be entered, before you can so enter the award of another execution. Now, if both are executed concurrently, the entry on the roll must be, that both were awarded and issued on the same day, which would be irregular. * * * It is clear, upon principle, that two executions cannot be acted upon at

the same time. Here two issue, and a seizure of goods takes place, which, if made the subject of an action of trespass, could only be justified under the *fi. fa.* Here, before any return to the writ of *fi. fa.*, the defendant's person is taken under the *ca. sa.*" The defendant was discharged out of custody.

The observations of Bayley, B., show that it is not the practice in England to enter all the writs of execution that may issue on the roll; and, until such entry, I see no reason why the writ itself may not be produced, or, if lost, why secondary evidence may not be given of its contents. If the issue of the writ is entered on the roll, as I have no doubt it may be, such entry would be in the nature of primary evidence of the issue of the writ; and on the proper proof of the record, either by exemplification or sworn copy, the issue of the writ, and, perhaps, its contents, would be well shown.

In *Knight v. Dawler* (Hardres, 323), it is stated, "So, in Sir Paul Pindar's case, in an action of trover and conversion of goods, the proof depended on a *fieri facias* and *venditioni exponas*; and in that case, because the *fieri facias* could not be found on record, it was admitted to be proved in evidence." The references are to Aleyn, 18; Style, 22, 34; *Whitmore v. Rooke* (Sayer, 299). There is also a reference to Gilbert's Law of Evidence (34), which I have not seen.

On the whole, I think the authorities warrant us in coming to the conclusion, that if the writ of *fieri facias* itself is produced, it may be given in evidence; if it be lost, and is not enrolled, secondary evidence may be given of it. We are also of opinion that the issuing of the writ of execution may be entered on the roll at any time, though it may not then be returned; and we see no reason why, if the plaintiff desired it, the officer might not make the proper entry on the roll whenever requested. *Ramsbottom v. Buckhurst* (2 M. & S. 565), shows that an examined copy of the judgment containing the award of *elegit* and return of the inquisition is evidence for the plaintiff claiming under *elegit*, without proving a copy of the writ and the inquisition. In *Kerby v. Siggers et al.* (2 Dowl. 654), where a writ was improperly recorded, the court stated the proper course was to move the court to take it off the file and quash the roll implying that the record, until quashed, was good evidence.

Rule discharged.

BOULTER v. HAMILTON.

Action for breach of covenant for title—Title by estoppel—Nominal damages.

In an action for breach of absolute covenant for title to land, *Held*, that the plaintiff (the vendee) was not entitled, without proof of special damage, to recover more than nominal damages, where the defendant (the vendor) had subsequently, and even *not until after action brought*, acquired the outstanding title; for by the doctrine of estoppel, as laid down in *Doe Irvine v. Webster*, 2 U. C. Q. B. 224, a perfect title to the land passed to the plaintiff through the defendant's former conveyance to him immediately upon the outstanding title becoming vested in the defendant, the bare title by estoppel which the plaintiff before alone had being thus fed by the after acquired interest which reflected instantly back upon the former, and perfected the plaintiff's title to the land.

This was an action of covenant, the writ in which issued on the 19th July, 1864.

The declaration alleged that on the 22nd July, 1857, the defendant, by indenture made between him and the plaintiff, did grant, bargain and sell to the plaintiff, those parcels or tracts of land situate in the township of Tecumseth, in the county of Simcoe, containing two hundred acres, more or less, being the north half of lot No. 8, and also the north half of lot No. 9, both said lots being in the 10th concession of the said township of Tecumseth, together with all the houses, out-houses, &c., and all hereditaments, &c., thereto belonging, to hold to the plaintiff, his heirs and assigns for ever, and the defendant did by the deed covenant, with the plaintiff, amongst other things, that at the time of the ensealing and delivery thereof he was and stood solely, rightfully and lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple of and in, the lands, tenements, and hereditaments, and all and singular other the premises thereinbefore described with their, and every of their appurtenances, and of and in every part and parcel thereof, without any manner of reservation, limitation, provisoes, or conditions, or any other matter or thing to alter, charge, change or defeat the same.

The plaintiff averred that all conditions were fulfilled and all things happened to entitle the plaintiff to maintain this action. The breach assigned was that the defendant was not at the time of the ensealing and delivery of the said indenture, solely, rightfully and lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple of and in the said land or any part thereof, but on the con-

trary thereof, at the time of ensealing and delivery of the said deed, one John Strathy was seised in fee simple of, in, and to the north half of lot No. 9, in the 10th concession of the said township of Tecumseth, and one John McWatt, of 90 acres of said lot No. 8, in the 10th concession. By reason of the premises the plaintiff had been deprived of the said lands and premises, and had been put to great costs in investigating and defending his supposed title thereto, by virtue of the said deed, and had been otherwise much damaged, and the plaintiff claimed \$2000.

The defendant pleaded that he was seised of an estate in fee simple in the land in the declaration mentioned, without any matter or thing to alter, change, encumber, or defeat the same.

The plaintiff took issue on this plea, and the cause was taken down to trial at the last assizes for the county of Simcoe before A. Wilson, J., when the following facts, material to be referred to, were given in evidence :

The plaintiff's deed, covering the land mentioned in the declaration, and shewing a consideration of £373 for the whole land, was put in and proved.

It appeared that the greater portion of all the land had been sold for taxes, the whole of the north half of lot No. 9, and ninety acres of the north half of lot No. 8, and that they were respectively vested in John Strathy and John McWatt ; that on the 27th September, and the 13th October, 1864, Strathy and McWatt respectively conveyed to defendant the north half of lot No. 9, and the north half of lot No. 8, and on the 17th October, 1864, defendant, by way of further assurance, conveyed both lots to plaintiff. This conveyance was produced at the trial, but there was no formal acceptance of it by the plaintiff.

The learned judge ruled that the plaintiff was only entitled to nominal damages, and the verdict was entered for that sum for the plaintiff. The jury were also asked to find the amount of damages they thought the plaintiff ought to have, supposing the title wholly failed to the north half of lot No. 9, and the learned judge allowed the defendant to show what the real consideration was for the deed, and to assess the damages according to such consideration. The real con-

sideration was a judgment in favour of this plaintiff against certain parties called Wood and Racey, which judgment was assigned by the plaintiff to the defendant. The jury found the half of the entire value of the consideration for the deed to be £150, and, if the plaintiff was entitled to recover the consideration money, they found that as their verdict.

The plaintiff had leave to move to increase his verdict to the £150 found by the jury. The charge of the learned judge was objected to so far as he limited the finding of the jury to one shilling.

McCarthy, on behalf of the plaintiff, obtained a rule *nisi* accordingly, to shew cause why the verdict for one shilling damages should not be increased to £150, or why the verdict obtained for the plaintiff should not be set aside and a new trial had on the ground of misdirection in the learned judge, who tried the cause, in telling the jury that they ought to assess the damages at the sum of one shilling, whereas if the evidence of the conveyance from the sheriff's vendee, John Strathy, to the defendant, and from the defendant to the plaintiff, was admissible in mitigation of damages, the jury ought to have been limited to one shilling as the measure of damages when the plaintiff had not been in the possession or occupation of the premises pretended to be conveyed to him by the defendant since the day of the execution of such conveyance, nor in the receipt of the rents and profits thereof, and in directing the jury to find only one shilling damages; and for the reception of improper evidence; viz., evidence to contradict or vary the consideration mentioned in the deed declared on from the defendant to the plaintiff.

McMichael shewed cause.—The very instant the fee of the land vested in the defendant, the plaintiff became seised thereof under the deed previously executed to him by the defendant, and he was, therefore, only entitled to one shilling damages. The defendant could not have pleaded the subsequent acquiring of the title after the suit was commenced in bar of the action or by *puis darrein continuance*, but he could shew in mitigation of damages that the defendant had the land, and that was what he bargained for. Nothing occurred at the trial to shew that plaintiff's damages were anything more than nominal, and therefore the learned

judge was right in telling the jury only to find for one shilling. No English authority has been found on the point, but *Baxter v. Bradbury*, 20 Maine Rs. 260, may be referred to.

McCarthy, contra.—The plaintiff is entitled to the full amount of his purchase money and to the interest thereon. As to the north half of 9 in the 10th concession, the title to which defendant acquired through Strathy, he had no interest whatever in it when he made the deed to the plaintiff; so that the plaintiff received nothing from the defendant for that portion of the purchase money which was for this lot, and this action was brought to recover back that for which the consideration had wholly failed. The plaintiff has not been in possession and has not in any way received any benefit from that lot, and, therefore, as to that the parties are in *statu quo*, and the plaintiff ought to recover the consideration given for it, when he (defendant) would receive back a release of any right plaintiff might have in it resulting from the conveyance to him, or the court might compel him to reconvey before receiving the amount of the verdict. If a defendant is at liberty to acquire the outstanding title, and set that up after a right of action has vested, he is placed in a better position than the plaintiff; for if the property has diminished in value he can buy it in for a less sum than he sold it for, and, when sued for his breach of covenant, he can shew that he had become possessed of the title since he made the conveyance, and thereby reduced the plaintiff's claim to nominal damages. On the other hand, if the property has increased in value, he will only be obliged to pay the plaintiff the amount of the purchase money and interest. In this way the party breaking the covenant has really the option of giving the title or not to the person to whom he has conveyed it. If it is his *interest* to perfect the title, he will do so: if it is not his interest to make good the title to the purchaser, he will only repay the money he has received for the property, and the interest; and in this way the man who has broken his covenant has an advantage over the man who has relied on it and paid his money for the land.

He referred to Mayne on Damages, 100; *Peacock v. Monk*, 1 Vesy Senr. 123; Rawle on Covenants, 3 edn. 76,

77, 78, 84 & 85; *Clark v. Tucker et al.*, 2 Sandford's Rs. 157; *Bingham v. Weiderwax*, 1 Comstock, 509; and in conclusion contended that it ought to have been left to the jury to say what damages the plaintiff had sustained between the purchase and the perfecting of the title.

RICHARDS, C. J., delivered the judgment of the court.

If the seller of a lot of land was wholly without title, and the purchaser did not get possession of it, and really received no advantage whatever from the conveyance, there would be much more force in the argument that he should have the right to rescind such a contract when the consideration wholly failed, and recover back his purchase money, than that he should be allowed to do so when something did pass by the deed, or when he had got into possession under the conveyance. But even in the former case, I am not prepared to say, that, if the seller afterwards acquires the outstanding title, the purchaser, in an action for a breach of the covenant for seisin, when there has been no eviction, and the plaintiff shews no other damage but the bare fact that the defendant had not the title when he conveyed, can recover more than nominal damages. Under the first conveyance, as between the parties, the purchaser had only an estate by way of estoppel: when the seller afterwards acquired the outstanding title the purchaser's estate became perfected; the estoppel created by the first conveyance being fed by the interest created under the conveyance from the real owner. In this way the purchaser gets a complete title to what he purchased, and how is he demnified? Smith's Real and Personal Property (2 edn. 733, 829.) But see *Stackpoole v. Stackpoole* (4 Dru. & War. 347;) *Loyd v. Loyd* (4 Dru. & War. 354.)

It is said that the defendant has an option of making good his conveyance by purchasing the outstanding title if the property has depreciated in value, or of paying back the purchase money and interest. What particular hardship is there in this more than in other matters relating to a breach of these covenants? Both parties, when they entered into the contract, supposed the seller had a good title. It is the duty of the purchaser to see that he is buying a good title, just as

it is the duty of the seller to see that he has a right to convey the property purchased. If the purchaser neglects his duty, he is made to suffer, when he has been evicted after making large improvements on the property, by only being able to recover back his purchase money and interest, often a very inadequate indemnity for his losses. When he gets a perfected title to that which he has purchased, he is only deprived of the option of throwing off a bad speculation; he has suffered no real injury, for if he could shew any, I have no doubt he could recover damages for that. .

In the country, in *Doe Irvine v. Webster* (2 U. C. Q. B. 224,) the question of whether an estoppel was worked under a deed of bargain and sale containing the usual covenants for title seems to have been settled, and that case has been received as authority in our courts ever since it was decided; and in *McLean v. Laidlaw*, in the same volume, at p. 222, on the authority of *Doe Irvine v. Webster*, and as a consequence of it, the court held, that the effect of the subsequent conveyance was, to make the estate of the original grantee an estate in interest from the time the first deed was made.

In *McLean v. Laidlaw*, the facts were these. The demandant claimed dower in certain lands of her husband, which he had conveyed by deed of bargain and sale in 1827, before her marriage. In 1834 the government patent issued of the lands, granting them to the demandant's husband after he had married her. The demandant's husband in 1834, made a second conveyance of the land, after he had obtained the patent, to the same person to whom he had made the deed of 1827. The land had been conveyed by the person to whom demandant's husband had conveyed, and had passed through several other parties until it vested in the defendant. The Chief Justice, in giving the judgment of the court, said: "Acting on the decisions which have taken place here (on the subject of estoppel) we can not do otherwise than hold, the demandant's husband was estopped by his first deed from denying that the estate which he assumed to convey passed by his deed. His widow claiming dower under or through him is also estopped, and it seems, as I have already stated, to follow as a necessary consequence of the application of the whole doctrine, that when the patent afterwards

came to him, the estate of the grantee, which before rested only upon the conclusion by estoppel, became an estate in interest, and the effect extends back to the time when the first deed was given, producing the same state of things in all respects as if the patent had issued before the deed was made;" and in consequence the dower of the demandant was refused.

The conclusion to which the cases in many of the States of the Union tend, on the subject of estoppel by deed, was well stated by Chancellor Walworth in the *Bank of Utica v. Mersereau* (3 Barbour's Ch. Rep. 568,) and this conclusion is quite in unison with the decision of our Court of Queen's Bench in *Doe Irvine v. Webster*, and the subsequent cases which follow it. I apprehend that the law of that case having remained unquestioned so long, will be followed in this province. If, then, it be admitted, as the authorities in our courts establish, that on the title to the land in dispute becoming vested in Dr. Hamilton, the defendant, that title at once passed to the plaintiff under the doctrine of estoppel, then, without any further assent on his part, he had a perfect title to his land, and consequently could only recover, under the circumstances, nominal damages. In the case of *Baxter v. Bradbury* (20 Maine. 260,) it was argued for the plaintiff, that the title by estoppel, could not enure to his benefit without his consent,—that he was not compelled to receive the title; but the court held that, "by taking a general covenant of warranty, he not only assented to, but secured and made available to himself, all the legal consequences resulting from that covenant. Having, therefore, under his deed, before the commencement of the action, acquired the seisin which it was the object of both covenants to assure, he could be entitled to but nominal damages."

A very good argument is put forth in one of the American courts, as to the effect of holding that the estate in interest did not pass at once to the first purchaser when the seller received the real title: "If indeed, an estoppel could not operate as a conveyance, or as a medium through which the title would pass to him in whose favour the estoppel works, we might frequently lock up the title in the person and his heirs against whom the estoppel operated, and the party for

whose benefit it was intended might find himself without title, and unable to recover from a mere intruder; for if the title to the after-acquired estate did not pass to the grantee by means of the estoppel, but it only precluded the grantor from asserting an after-acquired title, it would be difficult to see how the grantee could recover in ejectment from one who had no title. To shew the title in another would not enable him to recover, and he, having none, could not maintain the suit. To give, therefore, full effect to an estoppel, it is clear that it must frequently operate to pass the title." (Rawle 423.)

In Rawle on Covenants (2nd ed. p. 105) it is stated: "There is, however, a class of cases which hold, that when a conveyance is made containing a covenant of warranty, and the vendor afterwards acquires a title which is within the scope of that covenant, such after-acquired title immediately enures to the purchasers or those claiming under him by the operation of the doctrine of estoppel. * * * The opinion referred to seems to have been firmly established in many of the States of the Union, and, as its consequence, it has been held that although the purchaser's covenant for seisin may be broken, yet, if the vendor have subsequently acquired the outstanding title, which enures by estoppel to the purchaser by virtue of the covenant of warranty, these circumstances may be given in evidence in mitigation of damages, whose amount will then be but nominal."

In a subsequent chapter, Mr. Rawle reviews the English and American authorities on the doctrine of estoppel, and comes to the conclusion that by the law of England a deed of bargain and sale, containing a covenant for title given when the grantor had no estate in the land, does not operate actually to transfer an after-acquired title by mere operation of law, and that the estoppel so created is more in the nature of a personal rebutter, giving to the covenanted the right to come into equity for the conveyance of such after-acquired estate to him. He would have the option of either doing this or recovering damages on his covenant, and the covenantor could not compel him to do the one in preference to the other: (Rawle, 424, 425, 442-445).

The argument is urged, in some of the American cases,

that bringing the action on the covenant for seisin is a rescission of the contract, and that the plaintiff ought to have the option of recovering in that action or of filing his bill to compel the seller to give him the further assurance. There can be no doubt that a court of equity would always compel the seller, who had become possessed of the after-acquired title, to convey, so that he could never have the right to hold it against his own deed or bargain. The only option he really has, as the law now stands, is that of going into the market and buying from the real owner the outstanding title; and he thereby makes that perfect to the purchaser which he brought. If he cannot perfect the title, then the purchaser sues him on the covenant for seisin, and may recover back the whole of the purchase money; and it by no means follows that he is to give up the possession of the land. Why should he? The purchase money and interest may be but small compensation for the injury he has received. The following observation by a judge in one of the American courts seem to apply on this point: "A suit at law on the covenant of seisin is not to be regarded as a rescission or disaffirmance of the contract by the grantee: a recovery on that covenant would not prevent him next day suing on any other covenant in the deed. He is entitled to the benefit of all the covenants." It may be that a court of law would not permit him, after he had recovered on one covenant the whole purchase money and interest, to get more than nominal damages on another; yet that does not effect his legal right to the benefit of all the covenants. The covenantee, having his deed with covenants of general warranty and seisin, and for further assurance, could undoubtedly compel the vendor to convey any subsequently acquired title to him. He may sue on the covenant of seisin and recover damages, but if he prefers it, he may resort to his covenant for further assurance.

As the plaintiff failed to shew any damages at the trial, save that he did not acquire the title to the whole land by the defendant's deed to him, and as that title passed to him through that deed as soon as the outstanding title was vested in the defendant, I do not see the principle on which he can recover anything more than nominal damages. If it had been left open to him to say whether he would have the

defective title made good to him or not: if it had been necessary for him to accept another conveyance to vest in him the perfect title,—then it might be argued that he had the option of accepting it or not, and might reject it, and sue for the original purchase money; but the defective title having become perfected in him by the acquisition of that which was necessary to perfect it by the defendant by the effect of the deed which he did receive and the operation of law, how is he damnified by the former imperfect title, he having shewed no other damages?

I, therefore, come to the conclusion, that the directions of the learned judge who tried the cause to the jury, to give only nominal damages was correct, and that the rule to increase the damages must be discharged.

Rule discharged.

During the term the following gentlemen were called to the bar.

ALEXANDER ROBERTSON, JAMES KEITH, GORDON NICHOLAS MURPHY, WILLIAM HENRY RICHEY ALLISON, GEORGE MONCRIEF, JOHN PETER McMILLAN, JAMES DAVID EDGAR, JAMES HOSSACK, JOHN YEATS ELWOOD, ALFRED HECTOR, ANDREW GREGORY HILL, RUSK HARRIS, CHARLES SAMUEL JONES, GEORGE DEAN DICKSON, CHARLES HEYHOE GILMAN, Esqrs.

HILARY TERM, 23TH VICTORIA (1865).

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

FRANK V. CARSON.

Action of crim. con.—Evidence—Proof of Jewish marriage—Commission to take evidence—Defective state of envelope enclosing—Indorsement of style of cause—Annexing evidence taken—Contractions in entitling of affidavits of execution—Return—Admissibility of evidence.

A commission enclosed in an envelope, which comes to hand with an opening not large enough to allow of the escape of the paper contained therein, is sufficiently *close*, under Con. Stats. U. C. ch. 32. sec. 21, to render it admissible in evidence.

Effect of the word “ close ” considered.

Such commission need not be endorsed with the style of the cause in which it is issued.

It is not necessary that the evidence taken thereunder should be annexed to the commission.

It is no objection to the affidavit of execution that the contractions *plff.* and *def.* are used in the entitling of it.

A commission should be so framed in its terms as to be binding upon all parties to be examined under it, particularly as to the mode of administering the requisite oaths, as, for instance, to Jews.

Semble, 1.st An objection to a return to a commission, which states that the executions thereof will appear “ by the schedules and papers annexed,” while the examination and affidavit of due taking are not annexed, if such objection be either that the return is defective or that it is no return at all, may be fatal ; but in such case, if the objection be merely that the return is separated from the schedule, it must fail.

2. That in all cases a return should be indorsed on the commission.

A party who joins in acting under a commission, which contains specific directions as to the mode in which it is to be returned, cannot afterwards object that certain formalities prescribed by the statute, but not by the terms of the commission, having been omitted.

In an action of *crim. con.*, it is not necessary that direct evidence of adultery should be given ; it is sufficient to prove promiscuous acts and circumstances. *Held*, therefore, in this case, that the fact of the defendant having supplied the plaintiff's wife, while living apart from her husband, with a bedstead and mattress at her boarding house ; that he, an unmarried man, visited at her residence at all hours of the day ; that he was in the habit of driving and walking with her ; that he admitted he kept a woman ; and that he wrote a telegram from her to the plaintiff, calling her by his own name ;—were strong evidence of adultery having been committed by him with her.

Held, also, that a written contract was not essential to the validity of a "Jewish marriage, which had been solemnized with all the usual forms and ceremonies of the Jewish service and faith; and that such a marriage was valid, though there existed in relation to it a written contract not produced.

This was an action for criminal conversation with the plaintiff's wife, and for wrongfully enticing the plaintiff's wife without the plaintiff's consent and against his will, to deport and remain absent from the house and society of the plaintiff, whereby the plaintiff lost the society and services of his wife.

The defendants pleaded, Not guilty, and a denial of the person alleged to be the plaintiff's wife being his wife.

Issue was joined thereon.

The cause was tried at the last fall assizes for the united counties of York and Peel, before Mr. Justice John Wilson, when a verdict was found for the plaintiff, and two thousand dollars damages.

A commission, issued by the plaintiff, for taking evidence in the case, was produced at the trial.

. *C. Cameron*, Q. C., for the defendant, objected to its being received, because it was open at the end, and because it was not under the seal of the commissioners, or of either of them, and because on the back of the commission the cause was styled, "Abraham Frank plaintiff, v. James Carson, defendant."

It was stated by the clerk of assize, by consent, that he got the commission from a clerk in the Common Pleas office, and that it was in the same state when he gave it into court at the trial, as it was when he received it.

The learned judge noted that the envelope, in which the commission was, appeared to have been burst at the end, but scarcely enough to allow of the escape of the papers.

The commission was then opened, subject to these objections.

On its being opened *Mr. Cameron* further objected, that the answers were not attached to the commission, and that they had no appearance of ever having been attached; that the commissioners had not been properly sworn, for instead of having been sworn before a mayor they had sworn one another; that the commission was returned by one Thomas Byrne, while

it was directed to him as one of the commissioners by the name of Thomas Birne; that the return was, that the execution of the commission would appear by the schedule annexed, while no schedule was annexed; and that the affidavit of execution of the commission was not sufficiently entitled, as the words "plaintiff" and "defendant," after the parties' names, were not written in full.

The learned judge overruled these objections, reserving leave to the defendant to move against his ruling.

The commission was read: it is referred to below. The *viva voce* testimony was to the effect, that the witnesses knew the plaintiff and his wife when they lived in this city, on Richmond-street; that they afterwards moved to Nelson street west; that she soon after this went to a house in Esther-street, where her husband was not, and that the plaintiff always treated her kindly; that they knew the defendant; that an account against her was at one time given to the defendant to give to her; that the defendant was asked if Mrs. Frank was at his place and he said she was; that she was seen at the same place on two occasions, when one of the witnesses called upon her; that she had been seen with the defendant several times; that they had been seen driving together; that one of the witnesses thought she was the defendant's fancy woman; that she had bought linen and cotton for shirts, and had the articles sent to the defendant's place; that the telegram which was produced was in the defendant's handwriting: it was left at the telegraph office, and sent on to Syracuse, and was as follows:

"To

A. J. Frank,

149 Montgomery-street
Syracuse.

I cannot see you: I have plenty Canada money.

Loo. Carson."

The following memorandum was produced, written by Jacques & Hay's clerk, for the delivery of furniture:

"Mr. Carson, 43 Esther-street.

1 plain round-corner bedstead;

1 hair mattress, 40 lbs. at 55c.

Paid."

And the man who delivered the furniture said he got this memorandum, and he delivered the articles accordingly at that place, Esther-street, which is west of Spadina avenue; that she went to the house on Esther-street about a year before the trial, and lived there four or five months; that defendant then lived out of the city about four miles; that defendant was seen at the house on Esther-street at all hours and had been seen driving her; that he believed she was living with defendant at the time of the trial, at Brockton; that in June last the defendant was enquiring about a cruet-stand and a lady's basque, which he had lost at a fire; (he said, "The basque is not mine: it belongs to the woman I keep;") that plaintiff and his wife quarrelled on several occasions; that he said to her he would give her \$1,000 if she would leave him; that one morning about two o'clock, she went into the room of a family living in the same house with plaintiff and his wife, while they were living on Nelson-street, shouting "murder," and her brother then took a razor from under the plaintiff's pillow; that she remained in the room of this family the rest of that night; that they had a slight quarrel every day; that they quarrelled once about her putting some milk in sauce, it being against his religion to take milk with meat; that the quarrels were light, excepting the one before mentioned, at two in the morning: they were about religion. One of the witnesses said he was not present at the marriage of the plaintiff and his wife; that he lived then in Syracuse, where they resided: he was invited to the wedding.

The commission and the evidence taken under it were to the following effect: The commission was directed to Nathaniel B. Smith and Thomas Birne, both of Syracuse, to examine the persons therein named, as well on behalf of the plaintiff as of the defendant; the witnesses to be sworn according to the form of the oath first endorsed upon the commission; and it proceeded, "When you have so taken the examination, and reduced it into writing, you are to send the same without delay to our Court of Common Pleas at Toronto, in our said Province, closed up under your seals, distinctly set, together with the said interrogatoies, cross-interrogatories and *viva voce* questions, and the writ, to be filed of record in the said

court." The commissioners, before they acted, were to take the second oath endorsed on the commission, which was as follows: "And we give each of you full power and authority to administer such oath to the other." The clerk was to take the third oath endorsed on the commission.

The order under which the commission issued provided, "that either party may be at liberty, after the return of the said commission, to open the said commission and read the same, with the depositions thereunder, and to take copies or extracts therefrom, if they think necessary, on giving two days' notice of such intention to the opposite party."

The return of the commission was as follows:

"The execution of the within commission will appear by the schedules and papers thereto annexed.

(Signed) "N. B. SMITH,
"THOMAS BYRNE."

The commissioners appeared to have been sworn before the mayor of Syracuse, as represented; but it also appeared that each of the commissioners, administered the second oath to the other, and that Byrne then administered the third oath to Smith who acted as clerk.

The commission had nothing attached to it but the interrogatories and cross-interrogatories, while the answers were quite separate; and the affidavit of Byrne, referring to the oath which were administered, spoke of "the commission hereto annexed," while it was not annexed.

The evidence taken under the commission, so far as it is material, was as follows:

Julius Jacobs, a Jew, who was sworn on the book of Genesis, said: "I know the plaintiff, having known him about twelve years. I know a lady who was formerly Lousia Randall, having known her six or eight years. She is a Christian by birth: she was married to plaintiff at least four years since, in the city of Syracuse, by a Jewish priest named Selig: I do not know that the banns were published: the marriage took place at the house of the plaintiff's father." To the eleventh interrogatory, which was as follows, "State fully the forms and ceremonies observed by the parties before and at the time of

the marriage," he answered, "They were married according to the Jewish service: I acted as bridegroom for the plaintiff, and my wife acted as bridesmaid for Louisa Randall: we brought the parties together from separate rooms, according to the Jews custom: they were brought before the priest, and the Jewish service performed by the priest, as I have always seen it done: he took the ring from the finger of the bridegroom, and put it on the finger of the bride: he went through with the form in Hebrew: after he had put the ring upon her finger he said, that should bind them together as man and wife forever: this last was pronounced in the English language. The parties immediately thereafter lived as husband and wife at Syracuse: she did become a Jewess. The circumstances were, that she had a teacher named Pinkus, a Hebrew, to learn the Hebrew language; and she took a Hebrew name, Sarah. To make a Christian lady a Jewess, the first thing is to learn to keep a Jewish house, which consists in learning to keep separate dishes for different articles of food. On Friday evening she has to light two candles, and say her Sabbath prayer on that evening; and if necessary take a new name: she has to be baptised as a Jewess. She did willingly, of her own accord, go through such forms and ceremonies. The particular ceremony is performed by women, and I did not see it. The teacher was a man named Pinkus: he was not the regular teacher of the synagogue, but an old rabbi, who had been a teacher, and he was employed at that time as such by private families. After she became a Jewess, she assumed the name and was known as Sarah Frank. According to the laws of the Jewish church in the United States, the priest marries parties. The synagogue he was pastor of was recognised as a legal one: it had a charter according to the laws of the State of New York. The marriage was solemnised in due form: there was forty or fifty persons present: I and Pinkus, the teacher, were bridegrooms, and our wives were the bridesmaids. I understand that all that is necessary for a legal marriage in Syracuse is for the parties publicly to go through with a ceremony, by which they promise to be to each other husband and wife. There is no difference, in such a marriage, between

a Jew and a Christian, except that a Jewish priest will not knowingly marry a Jew and a Christian. I have seen a contract of marriage between the parties written in the Hebrew language. After the contract is entered into, they live together and cohabit as man and wife. The husband and wife repeat after the priest the words, "By this ring I marry you, according to the law of Moses, and promise to live with you as husband [or wife] as long as we are alive." I heard the plaintiff and Louisa Randall repeat those words. After such marriage she did, as other Jewish women, frequently attend the synagogue: she had a book, with the prayers translated into English, and used it." On cross-examination he said: "The marriage ceremony, before the giving of the ring, was in Hebrew. It was explained to her in English immediately before she went to the priest, and she was asked if she was satisfied. She said she was. Upon the giving of the ring the words were in English, as I have stated. She and her husband lived together as man and wife at Syracuse about two years before they went to Canada. I am not a lawyer, or an attorney, or counsellor-at-law."

Abraham Levy, a Jew, stated: "She was married October 16, 1859, corresponding with the Jewish year 5620. On the Saturday previous to the marriage, it was read off in the Jewish synagogue, where they attended, that the marriage would take place. There is a contract of marriage in Hebrew: it was drawn by the minister: it was signed by the parties to the marriage: I saw it signed. The parties shall live and cohabit together. I do not mean to say they should do so in order to make the marriage valid. The minister did pronounce them husband and wife in the English language: I heard them both repeat the words of the minister. I am the president of the synagogue, and have the possession of the books as such president. The second section is a copy of the marriage entry in the register of the congregation, shewing the marriage of Abraham Frank and Sarah Isaacs, and which is the marriage I have spoken of, at which I was present." To the cross-interrogatories he answered, "I am not a lawyer, or counsellor, or attorney-at-law."

Rebecca Cohen, a Jewess, said: "I know the plaintiff: have

know him about twelve years. I know the woman who was married to the plaintiff: knew her first on the 4th of July next before her marriage. Louisa Randall became a Jewess: I was present at her baptism: she was baptised in July before her marriage, in the Jewish synagogue, in Grape-street, in the city of Syracuse. In order to make a Christian lady a Jewess, she must be baptised, and do what other Jewish women do. She was baptised, and did what other Jewish women do: she did it of her own accord: she said she wanted to do what other Jewish women do. Mr. Selig baptised her: he was the minister in the synagogue: I helped in the ceremony: I brought the water for her to wash, and gave her clothes such as are required."

Israel Harrison, a Jew, said: "The husband puts a ring on the wife's hand, and that is a bond of marriage. Louisa Randall did become a Jewess before they got married, perhaps two months before: she wanted to marry him, and became a Jewess that she might do so. She must be baptised with water, that is the main thing; they are to be instructed in the way of keeping house, and learn to do as other Jewish women do. On becoming a Jewess, she took the name of Sarah Isaacs. The synagogue has a charter from the State: have seen it: it has a corporate seal. To make a legal marriage in the Jewish Church, where it is done by a minister, the ring is put on as the bond of the marriage. If a Christian wants to marry a Jew, he must become a Jew in order to be married in accordance with the Jewish service. There is a contract of marriage written in Hebrew, prepared by the minister: the husband and witnesses sign it: it is not necessary they should do anything afterwards to make the marriage valid. I can't repeat a translation of the language exactly; that is, of the words repeated by the husband and wife after the minister while the husband is placing the ring on the finger of the woman; but the meaning of it is, that she shall be holy to him according to the law of Moses in Israel. The exhibit marked "B," is shown to me, and is now before me: it purposes to be a contract of marriage, written in Hebrew. The first name subscribed to it is Simon Selig, the minister: the second name is Meyer Pinkus: he

is a witness : the next name is mine, as a witness, signed according to the Jewish mode, "Israel, the son of Michael." The contract of marriage is between Abraham J. Franks, the plaintiff, and Sarah Isaacs, formerly known as Louisa Randall. The paper was signed by the minister and witnesses at the time of the marriage : this is the very paper that was signed at the time : the last name is Abraham J. Frank. I was in a room with Louisa Randall at the house of the plaintiff's father, a short time before the marriage to the plaintiff. The minister came to her and asked her whether she consented to marry Abraham J. Franks, the plaintiff, and she answered "Yes." She appeared to be about nineteen years of age then. The ceremony was performed in the Hebrew language. When the minister asked her if she consented to the marriage, that was in English, and was a part of the ceremony.

The Hon. Henry Riegel said : "I am an attorney and counsellor of the Supreme Court of the State of New York : have practised fourteen years : am county judge. Marriage in the State of New York is treated simply as a civil contract, and no ecclesiastical ceremony is necessary in any case : it is enough if the parties publicly agree *in presenti* to become to each other husband and wife : it is not necessary that the marriage should be in accordance with the rites of any church, Christian or Jewish : no church informality will invalidate the marriage : the law looks only at the substance of the contract. In this State all males over sixteen, and females over fourteen, are competent to marry : such has been the law at least since 1830, when the revised statutes were adopted. Marriage in New York State does not require the intervention of any minister or magistrate in order to its validity, and it need not be celebrated in any particular church or place : it is enough if the parties publicly declare before witnesses that they intend to enter into that relation ; this was the law on the 16th October, 1859, and was so before and after that date. There is no difference in this respect in marriages between Jews and Christians, and the law was so at the time spoken of. It is doubtful whether a mere private bargain between parties, to live together as husband and wife, would

be considered as a valid marriage; but when they publicly enter into the relation, even without the intervention of any minister, priest, or magistrate, it is valid if done before witnessess. Cohabitation is not necessary to the validity of marriage in New-York State. Cohabitation may be shewn as evidence of marriage in certain cases. In actions for divorce, and for criminal conversation, an actual marriage must be proved." To the cross-interrogatories he said, in answer to the question, "What is the prevailing religion in the United States of America, and particularly in the State of New York is it the Christian or Jewish religion?" "There is no established church: there are more persons who profess the Christian religion than Jews: there is no statutory regulation in New York as to the law of marriage: there is no difference as to the ability to enter into a matrimonial contract, between a minor and an adult: no consent is necessary. If the plaintiff is an inhabitant of this State, he is entitled to a divorce for adultery committed out of the State. The law of divorce [in New-York State] is regulated by the revised statutes and new code of procedure."

It was upon this evidence the learned judge charged the jury, and upon this they found their verdict for the plaintiff.

In Michaelmas Term last *McMichael* obtained a rule on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a nonsuit entered, pursuant to leave reserved, or why a new trial should not be had between the parties on the ground, that the verdict was contrary to law and evidence, and for misdirection of the learned judge who tried the cause, and also for the reception of improper evidence.

The misdirection complained of was, that the judge told the jury that there was evidence of the marriage contract, and the only evidence of the marriage was that which was taken under a commission, which was not receivable, because it was not close under the hands and seals of the commissioners or of one of them; nor was it endorsed with the proper style of the cause, the endorsement being Abraham Frank and not Abraham 'J.' Frank; nor was the evidence taken attached to the commission; nor was the affidavit of

the due taking of the evidence properly entitled in the cause, but in another cause; and because the return was separate from the schedule.

It was also contended that the marriage was not proved; for the evidence under the commission showed that the marriage was a civil contract, which was reduced to writing, and which writing was not produced; and (being in a foreign language) was not translated and its contents proved.

It was further objected, that there was no evidence of the wrong complained of having been committed; that a marriage between a Jew and a Christian was not valid except as a civil contract, and under a civil contract the marriage might be for a fixed period; and it was not shewn that it was not so in this case; that there was no sufficient evidence of the act of the alleged adultery; and that the commission and the evidence taken under it were improperly admitted.

Robert A. Harrison shewed cause.—The defendant cannot have a nonsuit entered, because the plaintiff did not consent at the trial to any leave to that effect being reserved, and without such consent the judge cannot reserve leave to the defendant to move to enter a nonsuit: *Sutor v. McLean*, 8 U. C. C. P. 200. The rule must, therefore, be argued only upon the other parts of it applicable to a new trial being granted. The commission was issued under the Consolidated Statutes for U. C. ch. 32, s. 21: when it was produced by the clerk of assize at the trial one end of the envelope in which the evidence was enclosed was torn open: the clerk said he received the parcel from the clerk of the Crown and Pleas of this Court in the same state as he produced it: there was no evidence that the plaintiff had ever had it, or that it had been improperly tampered with; and there was reason to believe that it must have been opened by some of the post-office authorities in the United States; and so it is said the commission was not close under the hands and seals of the commissioners or of one of them. *Close* does not mean that it shall be *closed* against air and water, but close so that it may not be read: *McLeod v. Torrance*, 13 U. C. Q. B. 146; *Doe d. Parke v. Henderson*, 7 U. C. Q. B. 188; *Atkins v.*

Palmer, 4 B. & Al. 377; *Simma v. Henderson*, 10 Q. B. 1015, 1025; *In re. Saunderson*, 29 L. J. C. P. 264, 6 Jur. N. S. 1373; *Stebbins v. Anderson*, 20 U. C. Q. B. 239.

The return by one commissioner is good, although more than one be named in the commission. The omission of the 'J.' in the plaintiff's name in the endorsement is of no moment, because no endorsation is necessary. The evidence was with the commission when produced, although not attached to it; it may, however, have been annexed when it was returned. The affidavit of the taking of the commission is made by *Byrne*, while he is called *Birne* in the commission: this objection, if it be one, is within the rule of *idem sonans*.

And lastly, it is said the affidavit of due taking is not properly entitled, because the words 'plaintiff' and 'defendant' are not written at length, but are contracted 'Plff.' and 'Def.' This, however, is not an objection at all, and at any rate not to such an affidavit as this is: *McLeod v. Torrance*, 3 U. C. Q. B. 146; *Comstock v. Burrowes*, 13 U. C. Q. B. 439.

As to the marriage, it was proved in fact to have been performed at Syracuse, in the State of New York, according to the law of that State; but it was also valid as a Jewish marriage: *Lindo v. Belisario*, 1 Hag. Cons. Rep. 216-261.

The writing spoken of by the defendant is not the contract of marriage, but a writing which was made after the marriage ceremony was over and perfected. That a marriage in accordance with the laws of the United States was proved, is submitted, under the following authorities: *Harris v. Rickett*, 4 H. & N. 1; *Roger v. Hadley*, 32 L. J. Ex. 241, S. C. 9 Jur. N. S. 898; *Allen v. Pink*, 4 H. & W. 140.

As to translations of documents in a foreign language into English, reference is directed to Taylor on Ev., 4th ed., 983; *Shore v. Wilson*, 9 Cl. & Fin. 555, 556, 566, 567.

The proof of criminality was sufficiently established. It is impossible in most cases to prove actual guilt conclusively. *Codogan v. Codogan*, 2 Hag. Con. Rs. 4 (Note); *Chambers v. Chambers*, 1 Hag. Con. Rs. 444; *Williams v. Williams*, 1 Hag. Con. Rs. 299; *Elwes v. Elwes*, 1 Hag. Con. Rs. 269; *Wood v. Wood*, 4 Hag. Eccl. Rep. 138 (note C.) He also cited the following authorities, that the defendant should

be confined now to the objections which he took at the trial : *Hibbert v. Johnston*, Rob. & Har. Digest, "Commission," 9, H. T. 6 Vic.; Cameron's Dig. 1843, p. 16; *Farrell v. Stephens*, 17 U. C. Q. B. 250; *Comstock v. Galbraith*, 21 U. C. Q. B. 297; *Bunnel v. Whitlaw*, 14 U. C. Q. B. 241.

M. C. Cameron, Q. C., McMichael with him, contra.—When the commission was attempted to be used at the trial, the objections stated were taken to its admissibility, and leave was then reserved, without any objection by the plaintiff's counsel to the defendant to move to enter a nonsuit in case the objections should be found to be maintainable. At the close of the plaintiff's case these objections were renewed, and then it was that the plaintiff's counsel objected to any leave being reserved to the defendant to move; but this objection could not do away with the leave which he had before consented to being reserved to the defendant; and, therefore, the defendant is entitled to press these objections, not only as grounds for a new trial, but as causes of nonsuit. The objection to the evidence not being attached is not only a formal one,—it is one of substance; because the evidence referring to a commission as annexed, which is not annexed, is not properly identified. It is also objected that the commissioners took the oath of office before a third person, instead of swearing each other, according to the terms of the commission; and that the affidavit of the due taking of the commission refers to certain oaths as "second" and "third," having been taken; while these second and third oaths are from the papers not being annexed not described in any manner so as to be known what oaths it is which are thus referred to. Further, an affidavit with "plaintiff" and "defendant" contracted, is objectionable: *Chafe v. Parr*, 2 Q. B. U. C. 98. The answers to these interrogatories are not sufficiently answered: *Ryan v. Cullen*, 1 Cham. Rep. 229. The objection that the commission was not *close* at the time it was produced to be used in evidence, was a valid objection to its admissibility, because the statute, for sufficient reasons, has expressly provided for this, and there was no evidence explaining how it was that it was in such a condition.

The marriage of the plaintiff was not properly proved :

Catherwod v. Caslon, 13 M. & W. 261. The evidence of the foreign law was not that a marriage such as that spoken of in the evidence in writing was a good marriage, but only that a marriage between two persons of opposite sex, the man sixteen or upwards, and the woman fourteen or upwards, was a civil contract, and was a valid marriage in New York State.

All that took place, which is called a marriage, was a betrothal only, according to the case before mentioned, of *Lindo v. Belisario*, because a Jewish marriage was contemplated and intended by the parties, and not a marriage of a purely civil character, according to the local law of New York State; and a writing is an essential part of the Jewish ceremony of marriage: without it there could be no perfect marriage. The writing here spoken of and produced, but not proved and explained, was not a mere record of marriage performed, but was the contract of marriage itself, and should, therefore, have been proved, as the only means of establishing a marriage in fact: *Horn v. Noel*, 1 Camp. 61; Taylor on Ev. 4 ed. 391. The evidence of alleged criminality failed altogether, and, such as it was, was of matters which had occurred after the commencement of the action.

A. WILSON, J., delivered the judgment of the court.

The technical objections to the admissibility of the commission and the evidence accompanying it, which are mentioned in the rule, were all taken by the defendant's counsel at the trial, and we think he is entitled to take them now, for leave appears to have been reserved to him at the trial when he did take them to move upon them hereafter.

These objections are: 1st. The commission was not close under the hand and seals of the commissioners, or one of them. 2nd. It was not endorsed with the proper style of the cause, the endorsement being "Abraham Frank," and not "Abraham J. Frank." 3rd. The evidence taken was not attached to the commission. 4th. The affidavit of the due taking of the evidence was not properly entitled in this cause, but in another cause. 5th. The return was separate from the schedule.

As to the first objection, the statute requires that in case the commission shall be returned, with such examination and affidavit thereto annexed, to the court from which such commission issued, close under the hand and seal of one or more of the commissioners, the same shall *prima facie* be deemed to have been duly taken, executed and returned, and shall be received as evidence in the cause, unless it is made to appear to the court that the same was not duly taken. The commission itself directs the commissioners to "take such examination and reduce it into writing; and when you shall have so taken it, you are to send the same without delay to our Court of Common Pleas at Toronto, closed up under your seals, distinctly set, together with the interrogatories, cross-interrogatories, and *viva voce* questions, and this writ, to be filed of record in the said court."

As the defendant has acted under this commission, he cannot now say that the commission should have been returned under the *hands* and seals of the commissioners, or of one of them, when the commission speaks only of the return being made under the *seals* of the commissioners. The objection, then, that the commission was not under the *hands* and seals of the commissioners, or on one of them, cannot properly be taken, because the commission does not require it to be under *hand* at all; but as a fact, the commission was under the hand and seal of a commissioner, though not, as it is said, *close* under his hand in seal. The statute and commission are in other respects, as to the return, substantially alike. The return is to be made to the Court of Common Pleas close, &c.; but whether it was so returned to that court, we cannot tell, as there was no evidence on that point; although we should probably assume that it had been returned in the manner in which it was produced at the trial, especially as the clerk of assize stated that it was in the same state at the trial that it was then he got it from the clerk of the Court of Common Pleas; and as the proof that the commission had been duly executed, lay upon the party producing and using it. But when we find, in the order for the commission, that either party may, after its return, open it, &c., as before stated, we cannot say we must assume is not to have been returned close

by the commissioners as they were commanded, or that it may not have been opened by the parties who had the liberty of doing so. It was not urged at the trial that it had not been opened by the parties, and probable it was not; but this we only surmise; and it is not improbable as a fact that the whole parcel was, then it was produced at the trial, just in the same condition as it was when it was received by the clerk of Common Pleas from the post-office here; and as a fact too, it is scarcely probable that the commissioners transmitted the parcel in an envelope, which had been carefully closed with some adhesive substance, and under the hand and seal of one of them, and yet left it, as the judge at the trial said it appears to have been, burst at the end. It was suggested on the argument, that it was probable the parcel had been torn at the end in the post-office department in the United States for the purpose of discovering the contents, during the present disturbed state of that country, and it is most likely that the bursting at the end was occasioned in that manner.

While, therefore, the specific enquiry and exception were not made at the trial, as to whether the parcel may not have been opened under the authority of the judge, and as such a parcel is subject in its transit to many risks, especially at the present times, we ought to assume the commissioners have done their duty, by returning it to the Court of Common Pleas close, &c., and more particularly as the learned Judge was of opinion at the trial that the covering, though burst at the end, "was scarcely enough broken to allow of the paper coming out." *Atkins v. Palmer* (4 B. & Al. 377).

The statute, too, does not declare that a commission in such a condition shall not be receivable by the court, but declares that if it be returned close, &c., "the same shall *prima facie* be deemed to have been duly taken and shall be received in evidence," &c.; so that, although the commission might not be strictly close, &c., it does not follow it might not nevertheless be receivable in evidence; *McLeod v. Torrance* (3 U. C. Q. B. 146); *Doe'd. Parke v. Henderson* (7 U. C. Q. B. 188.) Suppose the parcel were, with the mail in which it was, sunk in the water for several days, or partially consumed

by fire, and in either cases injured to the extent to which the present covering was hurt, the judge might on satisfactory evidence of these facts admit the evidence ; or, suppose one of the commissioners were to bring the commission and evidence into court and deliver it there at the trial with his own hand, and were to state that since the close of the commission the papers had never been out of his hand, and that they were then in exactly the same state as they were when the proceedings were finally closed, why should not the commission he produced not be receivable in evidence when the statute does not forbid it ?

Close under the hand and seal, &c., we suppose should receive the meaning which the words ordinarily bear when applied to parcels generally which are transmitted through the post-office. A letter is usually quite close, so that no part of the contents can be seen ; but many documents are closed up and passed through the post-office which are not wholly closed or enclosed ; and we are not prepared to say that a document quite enclosed in an envelope, excepting that one end of the covering is burst, is not a document which may be called close or closed ; or that a parcel folded and secured by tape or cord merely, so that it cannot be read or opened without force, is not also a document which may properly be called close or closed, especially when the opening was scarcely large enough to allow of the papers coming out.

The second objection we think of no moment, for there need be no endorsement of the cause at all.

The third objection is one arising upon the defendant's construction of the statute. The commission does not require the evidence to be attached, and the statute, even upon this construction, does not, as before mentioned, declare that in case the examination is not attached it shall not be receivable in evidence. The words of the statute shew, we think, that the "thereto annexed" means that the affidavit of due taking of the examination is to be attached to the examination, and not that the examination is to be attached to the commission. But then it was urged that the affidavit of due taking, which is annexed to the examination, speaks of "the commission hereto annexed," while it is not annexed ; but this is only in

the description of the commissioners, when after giving their place of abode and callings it is added, "commissioners named in the commission hereto annexed." In the other parts of the affidavits the commissions is referred to as "the said commission," or "the commission." We think this objection must fail.

The fourth objection, as explained in the argument, is, that the words after the parties' names are contracted, "plf." instead of plaintiff, and "def't." instead of defendant. We should not have understood from the objection taken that this is the defect intended to have been taken: the objection is, that the affidavit was "not properly entitled in the cause, 'but in another cause.'" If the affidavit, then, is not entitled in *another* cause, the objection fails, for the exception is restricted by these latter words, as in a breach that the defendant had not used the farm in a husband-like manner, "but on the contrary had committed waste," the allegation limits the plaintiff to proof of such acts of unhusband-like farming as amounts to waste: *Harris v. Mantle* (3 T. R. 307). The rule in entitling affidavits is, that "it must clearly appear from the title of the affidavit, which of the parties are plaintiffs, and which are defendants; "and there is no case but the one referred to in 2 U. C. Q. B. 98, which shews that the words so contracted are objectionable. The cases referred to, of *McLeod v. Torrance* and *Comstock v. Burrowes*, are directly against the force of this objection in this proceeding. We think, then, restricted as it is, and also on the more general ground that it is no defect, it must fail also.

The fifth objection does not arise upon either the statute or the commission. The affidavit of due taking is probably the formal return, or may be taken in the place of it, when it is made by a commissioner, although in all cases, as the commission is a writ, there should, perhaps, according to the usual practice of the court, be a short return endorsed upon the commission itself. There is a return in this case, but it states that the execution of the commission will appear "by the schedule and papers thereto annexed," and the examination, and affidavit of due taking are not annexed to the commission, but are separate from it. We are not required to say how

rigidly such an imperfect return might be enforced, if the objection were clearly taken ; but it is not objected that there is no return to the commission, or that the return is defective ; the only objection is that the return is separate from the schedule, and that we do not conceive fairly hits the objection which was argued, and, perhaps, intended to have been raised. We think this objection must fail also.

We must now point out what would, we think, have been an objection of a more serious character to the reception of this evidence, if it had been taken at the trial, in order that the same risk may not arise in any other case, and that the form of commission may be altered to suit every class of witnesses who may be required to give evidence. The commission directs the examinations of the witnesses to be had on their respective "corporal oaths or affirmations, to be first taken before you or either of you upon the Holy Evangelists," &c.; while Julius Jacobs, Abraham Levy, Rebecca Cohen and Israel Harrison, being all Jews, are certified to have taken their corporal oaths respectively upon the book of Genesis. The *form* of administering the oath is of no consequence in law, so long as it is administered in such form and with such ceremonies as the parties declare to be binding on their consciences. The commission, therefore, should be adapted in its terms to the rules of the law.

Some other formal exceptions were taken at the trial, and were argued before us, which we do not see are within the terms of the rule. We do not, therefore, say anything of them, although we have no idea that they could have prevailed if we had been obliged formally to have disposed of them.

The other portions of the rule to be considered are, that the verdict was contrary to law and evidence ; that the marriage was not proved, inasmuch as the contract of marriage had been reduced to writing, and it was not translated or proved ; and that there was no evidence of the wrong complained of having been committed.

As to the proof of the wrongful act complained of, the jury had to infer it from the following facts : that the person alleged to be the plaintiff's wife left the plaintiff's house, and went to board at a house on Esther-street, at which house her

husband was not living ; that there was evidence from which the jury might infer that the defendant bought and had sent to this house while she was there a bedstead and mattress ; that the defendant was seen at this house at all hours ; that he acknowledged she was at his place ; that they were frequently seen together, and driving together ; that she had bought materials for shirts, and had them sent to the defendant's place ; that the defendant wrote the telegram which was sent to the plaintiff at Syracuse, and signed it " Loo Carson," manifestly meaning Louisa Carson, Louisa being her Christian name, and Carson the defendant's surname ; that he admitted he kept a woman ; and that one of the witnesses, from all he said, thought she was his " fancy woman." It is not required that direct evidence of the fact of adultery shall be given, as this, it is said, would render the relief of the husband almost impracticable. It is sufficient to prove merely proximate acts, and this will unquestionably sustain the whole of the averment. These proximate circumstances must be such as by former decisions, or in their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed, and the court will draw the inference which these acts unavoidably lead to.

The fact of a plaintiffs' wife accompanying a man to a house of ill-fame (*Kenrich v. Kenrich*, 4 Hag. Ec. Rep. 138 ; *Wood v. Wood*, in note (b) of the same report) ; that the plaintiff's wife being with the defendant at his father's residence, left it in the evening together ; that he returned alone about ten o'clock at night, and she about two hours afterwards, much agitated, and remained in the house all night ; that immediately after this they both disappeared from England ; that it was not proved they eloped together ; and were not known to have returned for many months afterwards (*Catherwood v. Caslon*, 1 C. & Marsh. 431) ; that the plaintiff's wife, being estranged from her husband, is constantly with a young man, living together in the same house, though under the bare appearance of separate beds ; wherever she is, he is there also (*Chambers v. Chambers*, 1 Hag. 444) ; that the wife renewed, after marriage, her acquaintance with a young man she had been intimate with before marriage ;

that after this renewal of acquaintanceship, she carried on a clandestine correspondence with him, sending him her portrait and receiving his in return; that soon after her marriage she treated her husband with neglect, absenting herself from him for several hours together; that being in Paris together, she was joined by the young man at the railway station the moment her husband took his departure for England; that he visited her during the day at her lodgings, and again at night, she being at the time partly undressed; that after remaining some time in the sitting-room, they both vainly urged the servant woman to go to bed; that he, alleging illness, went into the wife's bed, while she sat by the side of it; that although the servant sat up all night until about six in the morning, and during that time went frequently into the bed-room, the two were nevertheless left alone for considerable periods together; that after this he continued to visit her once or twice daily, remaining with her for about an hour at a time, and that on these occasions they went out walking together, and once drove out in a carriage, and were absent for a considerable time (*Davidson v. Davidson*, 2 Jur. N. S. 547);—are all cases where the proximate acts were held to be sufficient evidence from which the criminal act might be inferred to have been committed. In not one of them do the proximate acts, coupled with the admissions of the defendant in this case, constitute so stringent a body of evidence as there is here, from which criminality may be inferred.

In this case, while the plaintiff's wife, as she is represented to be, was separate from her husband, she is supplied, as the jury must have believed, with a bedstead and mattress by the defendant at the house where she was boarding; and as she was supplied with these articles, it is not improbable he also supplied her with others, and that he even paid her board, for she is not shewn to have had the means of doing so herself. That he, an unmarried man, visited at her residence at all hours of the day, and, as the jury must have believed, visited *her*; for, as they were often seen walking and driving together, it is not improbable, as he visited at the house where she was living, that it was to visit *her* he went there; that he admitted he kept a woman, and, as

the jury must have believed, that he kept this woman as his mistress, and that he wrote the telegram from her to her own husband, calling her by his own name of Carson, as if she were his wife, in which telegram he says, in her name, "I cannot see you; I have plenty of Canada money. Loo Carson;"—looking at all these facts and circumstances, it is impossible to say that they are not evidence against him, more or less cogent, of the fact of adultery having been committed.

Who was the woman he kept? Certainly the woman he was walking and driving with, and visiting at all hours of the day, and the woman he called after himself in the telegram which he wrote for her. There can, therefore, be no doubt that this woman is the same person who is claimed by the plaintiff to be his wife, and very little reasonable doubt that with all this intercourse and freedom, there were opportunities for criminal intercourse, and that as much intercourse was for such improper purpose, these opportunities were not neglected by the parties.

We have no evidence where they walked or drove to, or how long they were absent, or how long he continued his visits to her: the only witness who speaks of these visits, said "he did not remain long at a time;" but all the jury had to be satisfied of was, in the language of Dr. Lushington, in the case of *Robinson v. Robinson*, "that a criminal attachment subsisted between the parties, and that opportunities occurred when the intercourse which it is satisfied the parties intended to indulge might with ordinary facility have taken place;" and we think the jury were, upon the evidence, quite warranted in finding the defendant guilty of the wrongful act complained of.

In such a case it must be borne in mind, that no new trial is ever granted unless the adultery be denied, which has not been done; although we must say the case was not as fully brought out as we presume it could have been. There was no explanation of the circumstances of the wife leaving her husband's home and moving to Esther-street; whether the defendant was in any way concerned in this change, or that he even knew her before that time; nor was it explained how long the defendant stayed at Esther-street when he

visited there ; nor how the telegram came to be written ; nor whether she was privy to the use of her name by the name of the defendant ;—so that the wrongful act was not as fully proved as we believe it well might have been.

Then as to the question of the marriage of the plaintiff with the woman he alleges to be his wife, the evidence shews very clearly that she became a Jewish convert for the purpose of her marriage with the plaintiff, and that the marriage was solemnized as between two Jews according to the ceremony and ritual of the Jewish church in New York State. According to the language, then, of Sir Wm. Scott, in the case of *Jones v. Robinson* (2 Phil. 285) in which it appears a Jewess was married to a Christian after the Christian form, “she conformed in this respect to the Christian religion, so she submits to restrictions of that form, and is bound to the consequences if she departs from them.” The plaintiff contends the marriage, as proved at the trial, was perfect, according to the Jewish law, independently of locality ; or that at any rate it is valid, independently of the religious persuasions of the parties, according to the laws of the state where it was celebrated. The defendant insists that the parties intended to conform only to the Jewish law, and not to the general municipal law of the country where the marriage took place, and that the question of marriage or no marriage must, therefore, be determined only by the Jewish law ; and that, according to that law, no perfect marriage ever was celebrated between the parties, but at the most only some proceeding equivalent to betrothment ; because there was no written contract of marriage produced, and such a contract is an essential part of every such ceremonial to constitute it a full and valid marriage.

There was some such document entered into at the time of this marriage, and produced at the trial, in the Hebrew language ; and it was also proved by Israel Harrison, one of the witnesses examined by commission, who is a subscribing witness to it ; and who said, “This is the very paper that was signed at the time.” But there was no translation of it made for the court or jury, and, as a fact, neither the court nor jury knew the meaning or effect of it. There

should have been a translation of this document made and submitted to the jury to constitute it proper evidence; and as there was not, it cannot be said to have been proved, and not being proved, so far as this trial was concerned, it must be considered as if it had never existed, according to the maxim, "*de non apparentibus et non existentibus eadem est ratio.*" In addition to the references on the argument as to translation, see *Zenobio v. Oxtell* (6 T. R. 169); *Jenkins v. Phillips* (4 C. & P. 766); *Gether v. Capper* (18 C. B. 866); *Amann v. Damur* (8 C. B. N. S. 597). The question, then, really is, whether this was a valid marriage without a contract in writing, being celebrated between two Jews; or was valid according to the law of the State of New York, if the plaintiff can rely upon the law on this occasion. The facts stated on this point are to the effect, that the ceremony was performed by a Jewish priest, in due form, as it was usually done, who, according to the laws of the State of New York, is authorized to celebrate matrimony, at the house of the plaintiff's father in Syracuse, in the State of New York, according to the Jewish service and faith, and that there were two bridegrooms and two bridesmaids, and forty or fifty spectators present at the time. The bridegroom and bride were brought from separate rooms, according to the Jewish custom, and brought before the priest: the priest took the ring from the finger of the bridegroom, and put it on the finger of the bride: she had the meaning of all this explained to her, and she understood it, and assented to it: he went through the form in Hebrew: after he put the ring upon her finger he said, in English, that should bind them together as man and wife forever: the parties immediately thereafter lived as husband and wife at Syracuse for about two years. All that is necessary for a legal marriage in Syracuse is, for the parties publicly to go through with a ceremony, by which they promise to be to each other husband and wife: the parties repeat after the priest the words, "By this ring I marry you, according to the law of Moses, and promise to live with you as husband [or wife] as long as we are alive;" and these parties did repeat these words after the priest: the minister pronounced them to be man and wife: that putting the ring on the wife's hand is the

bond of marriage. Then it is further added, as to the contract: Julius Jacobs said, "I have seen a contract of marriage between the parties, written in the Hebrew language: after the contract is entered into they live together as husband and wife." Abraham Levy said, "There is a contract of marriage in Hebrew: * * * I saw it signed: the parties should live together: I do not mean to say they should do so to make the marriage valid." Israel Harrison said, "There is a contract of marriage, written in Hebrew, prepared by the minister: the husband and witnesses sign it: it is not necessary they should do anything afterwards to make the marriage valid: * * * it was signed at the time of the marriage."

None of these witnesses say that the written contract is an essential ceremonial or part of the marriage, or that it would be either invalid or informal without it. The twenty-fourth question, to which they answer, does not raise the question of the effect of this contract on the marriage, or of its necessity. The questions which apply to the regularity, completeness and validity of the marriage ceremonials and the marriage itself, are the 11th, 22nd and 23rd; and none of the answers to them shew that any written contract was an essential or even a usual part of the ceremony. The ring is spoken of as the "bond of marriage," but the contract is nowhere so referred to. The only witness who answers the 23rd interrogatory fully is Israel Jacobs, and he said, "I understand that all that is necessary for a legal marriage in Syracuse is, for the parties publicly to go through with a ceremony, by which they promise to be to each other husband and wife."

In the face of the testimony, and the general concurring evidence of the other witnesses, on the same point, which we must accept as sufficient evidence in answer to an interrogatory bearing directly upon the subject of enquiry, we cannot assume, on the inconclusive language used by the witnesses in answer to a question not raising the validity or effect of the contract upon the marriage, that a written contract of marriage is a necessary and essential part of the proceeding, and that the marriage itself may be imperfect or invalid without it. From what Levy say of it, one might

infer that the object and purport of it was that the parties should live together; and yet, he says, it was not necessary they should actually do so to make the marriage valid.

According to the case of *Lindo v. Belisario*, this ceremonial was a perfect Jewish marriage, for there it was expressly determined, upon the unanimous testimony of all the witnesses who were examined, and of the professors, rabbis, and different bodies whose opinions were taken, that a written contract was not an essential part of the Jewish marriage law. What is there called *Kedushim*, is the solemn and mutual declaration made, in Hebrew terms, at the delivery of the ring; and the delivery of the ring itself, and this with consummation, is perfect marriage: without it, it is merely betrothment, and the husband has not the rights of marriage. Subsequent cohabitation is equivalent to what is there explained as *Hupa*. See also *Goldsmid v. Bromer* (1 Hag. Cons. Rep. 324).

The cases cited of *Harris v. Rickett*, *Rogers v. Hadley*, and *Allen v. Pink*, establish, that when the agreement between the parties is complete by parol, it is not affected at all by a part of it being in writing, if the parties did not mean that the written memorandum should contain the whole agreement.

In *Wake v. Harrop* (6 H. & N. 775), Bramwell, B., says: "It should be borne in mind that a written contract not under the seal is not the contract itself, but only evidence, the record of the contract: * * * * it is always open to the parties to show whether or not the written document is the binding record of the contract."

The case of *Horn v. Noel* (1 Camp. 61), does not shew that a written contract is generally required to constitute a valid marriage between Jews; for there it appeared that the ceremony which took place at the synagogue was merely a ratification of a previous written contract; and, as that contract was essential to the validity of the marriage, it was necessary to prove it, which was done. But that case cannot be supposed to state the general law on the subject, in opposition to the elaborate exposition which it received in the case of *Lindo v. Belisario*, the appropriate tribunal for the disposal of such matters.

We come, therefore, to the conclusion that this marriage is valid according to the evidence which we have of the ceremonials and requisites of the Jewish Law, and this whether the lady be regarded as a Jewess or a Christian ; (*Goodman v. Goodman*, 4 Jur. N. S. 1220, affirmed on appeal before the Lords Justices, 5 Jur. N. S. 902,) and on the testimony given by the witnesses under the commission. Independently of this peculiar law, it is very clear on reading the evidence of Mr. Riegal, before referred to, that the marriage was and is a valid marriage according to the general law of the State of New York, where it was performed, the general rule of law being that a marriage, valid according to the law of the place where it is celebrated, is good everywhere else : *Story's Conflict of Laws*, secs. 79, 80, 81, 113 ; and it is said to be " the safest course always to be married according to the laws of the country " where the ceremony is performed, " for then no question can be stirred : " *Reeding v. Smith* (2 Hag Cons. Reps. 385, 6) ; *Story's Conflict of Laws*, ss. 119, 120, 151 ; *Lacon v. Higgins* (3 Starkie, 178) ; although it is not pretended that the *lex loci* will sanction marriages prohibited by the laws of the country of which the parties are subjects, for such prohibition follows them everywhere : *Fenton v. Livingstone* (5 Jur. N. S. 1183).

Such a marriage, then, as the present, conformable to the special law of the Jews, and sanctioned by the general laws of the country where it took place, cannot be impeached, because there was also accompanying it a written memorandum of the marriage, so long as the validity of the ceremony does not depend, and we know it does not, upon the fact and existence of such a writing. It may be evidence of the contract, but it is not the only evidence by which it can be sustained. Payment may be proved as a fact, although a receipt may have been taken ; and marriage may be proved by parol, although a register of it has been preserved.

We think, in this case, a great deal of trouble might have been spared to us if the proper means had been taken before the trial to have procured a translation of this Hebrew contract. Two copies of it were informally furnished to us

during the argument, one by each party, and both translations furnished by persons residing in this country; and no doubt there are many others to be found there who could have given the proper translation if they had been applied to in time; but we cannot understand why one of the witnesses to it, and who was examined under the commission, should not have been asked to explain the document to which he testified, and which was laid before him at the time of his examination. If this had been done, it might have been made to appear that this instrument is not the contract of marriage properly, but is that contract which is called in *Lindo v. Belisario* "Keutbah," or what the husband binds himself to give to his wife for dower.

We think the rule should be discharged.

Rule discharged.

FEATHERSTON V. McDONELL.

Conveyance in fee by infant—Confirmation—Title by estoppel.

Where the defendant, during nonage, conveyed in fee, without title thereto, certain land, in pursuance of the "Act to facilitate the conveyance of Real Property," to the grantor of the plaintiff; and, though fifteen years had in the meantime elapsed since attaining his majority, took no steps to repudiate his deed, until he defended on this ground an action of ejectment brought against him to recover the land, a conveyance of which had in the interim, and after the conveyance to the plaintiff, been made to him (defendant) by the person entitled thereto; *Held*, that the defendant's deed was merely voidable, not avoid, and that being therefore, good until avoided it might be assumed, from the circumstances of the case, until the power given to the court to draw inferences of fact, that the defendant had confirmed the deed and that he could not now avoid it by setting up in this suit the defence of infancy at the time of its execution, inasmuch as it had become confirmed before the action brought.

Grace v. Whithead (7 Grant, 591) remarked upon,

Held, also, that the deed in question by way of estoppel, and that the title subsequently acquired by the defendant passed at once to the plaintiff

Todd v. Cain (16 U. C. R. 516) and *Doe McGill v. Shea* (2 U. C. Q. B. 483) distinguished.

This was an action of ejectment, to recover possession of the east half of lot No. 20, in the 8th concession of the township of Osgoode, in the county of Carleton.

The cause was taken down to trial at the fall assizes of 1864, at the city of Ottawa, before the Chief Justice of this court.

At the trial it appeared that the lot in question was patented on the 14th September, 1828, to Duncan McDonell, who, by his last will and testament, devised the land, as hereinafter mentioned, and who died in 1834.

His eldest son and heir-at-law, Donald William McDonell, on the 22nd January, 1847, conveyed the lot to Alexander McDonell, the defendant, who, on the 21st September, 1847, in pursuance of the Act to facilitate the conveyance of Real Property, in consideration of £100, conveyed and granted to Isabella McDonald, of the township of Osgoode, widow, her heirs and assigns, the said lot, containing by admeasurement 100 acres, more or less.

Isabella McDonell, on the 11th August, 1860, mortgaged the lot in fee to the plaintiff, to secure £200, payable in five years, with interest at 12 per cent., payable annually.

By the will of Duncan McDonell, the patentee, which was proven, the land was devised to Donald McDonell, the son of his brother Alexander, and also of Isabella McDonell.

On the 2nd April, 1863, the devisee, Donald, the son of Alexander and Isabella, in consideration of \$50, conveyed the land in fee to the defendant, Alexander, who had made the deed to Isabella on the 21st September, 1847. It was proved that defendant was born on the 31st January, 1828, and consequently was but nineteen years and a little over seven months old when he made that deed.

It further appeared that when the deed of 1847 was made by the defendant to Isabella, she and her son Duncan were living on the lot, and that the mother continued to reside there until her death, which happened before the deed of 1863 was made.

A verdict was directed to be entered for the defendant, with leave to the plaintiff, to move to enter a verdict for him, if the court should be of opinion that under the facts of the case the plaintiff ought to recover; the court to be at liberty to draw inferences of fact.

In Michaelmas term last, *C. S. Patterson*, for the plaintiff, obtained a rule *nisi*, pursuant to leave reserved, to set aside the defendant's verdict and to enter a verdict for plaintiff, on the ground that the plaintiff's title had been established by the evidence under the deed from the defendant, Alexander

McDonell to Isabella McDonell, which had not been avoided by Alexander McDonell on coming of age, but had in fact been confirmed by him, and under the title of Isabella McDonald, acquired by possession of the land in question.

J. S. McDonald, Q.C., shewed cause.—As it was clearly shewn that the defendant, when he conveyed, had no title to the land, his assignee can take nothing from him, and her possession cannot be considered as a possession in herself, because her son was living with her, and he was the true owner in possession, and, therefore, no possession could run against him. The only ground on which plaintiff can succeed against Alexander is, that the deed of 1847 operated by way of estoppel; and when he acquired the title, in 1863, this fed the estoppel, and the estate of Isabella McDonell's assignee then became an estate in interest. But this cannot be; for the deed of 1847 was given when he was an infant, and was either void on that account, or, if only voidable, was not confirmed in any way after he became of age. He could not have done any act that would have effectually repudiated the deed; for if he had brought ejectment, he could not have shewn he had any title. No estoppel can arise under such a conveyance as was made by the defendant, Alexander, to Isabella. He cited *Todd v. Cain et al.*, 16 U. C. Q. B. 616; *Doe dem McGill v. Shea*, 2 U. C. Q. B. 483.

C. S. Patterson, contra.—The deed of Alexander has been confirmed, for it is only voidable, and not void: *Zouch v. Parsons*, Burrowes, 1794; Perkins, sec. 154; McPherson on Infants, 467; *Doe Jackson v. Woodruff*, 7 U. C. Q. B. 332; *Mills v. Davis*, 9 U. C. C. P. 510. Allowing time to elapse without repudiating the deed or contract is evidence of ratification: *N. W. Railway Co. v. McMichael*, 5 Ex. 114; *Cork and Bandon Railway Co. v. Cazenove*, 10 Q. B. 935; *Dublin and Wicklow Railway Company v. Black*, 8 Ex. 181; *Harris v. Wall*, 1 Ex. 122; *Mawson v. Blain*, 10 Ex. 206; *Shepherd's Touchstone*, 313; *Dart on Vendors*, 3rd ed. 13. The delay was a ratification: Alexander might have repudiated the deed by giving notice, by making an entry on the land, and by bringing ejectment; for if Isabella McDonell entered under him, she could not set up any

defence against his title. As to the estoppel, reference is directed to *Doe Irvine v. Webster*, 2 U. C. Q. B. 224; *Cuthbertson v. Irving*, 4 H. & N. 742; S. C. 6 H. & N. 135; and generally, attention is called to *Doe Boulton v. Walker*, 8 U. C. Q. B. 571; *Doe Radenkurst v. McLean*, 6 U. C. Q. B. 530; *Slator v. Brady*, 14 Ir. C. L. Ex. 61.

RICHARDS, C. J., delivered the judgment of the court.

Some of the questions arising in this cause have been clearly settled by the decided cases in our own courts, and it will only be necessary to consider one or two points, in order to come to a conclusion how we ought to decide this case.

To take the decided points first. *Doe Irvine v. Webster*, and subsequent cases thereto in the Court of Queen's Bench in this Province, decide, that the effect of an estoppel, as to the title created in that way by deed, is to vest the estate in the grantee and those claiming under him; so that if the grantor acquires a title subsequently to his deed, the estate at once passes to, and becomes an estate in interest in, the grantee in the first deed. *Mills v. Davis*, in this court, also decides that the deed of an infant is not void, but only voidable; and, as a consequence, it would be good until the infant took some steps to avoid it.

Supposing the estate to have been vested in Alexander McDonell in 1847, when he made the deed to Isabella McDonell, has he done any act to avoid that deed, and if so, what are the acts, and when did he do them? If the acts avoiding the deed were not done until he had confirmed it, then I apprehend, if the deed were once confirmed, after he became of age he could not afterwards avoid it.

From the time of the deed to Isabella McDonell up to the defending of this action in April 1863, as far as we have any information on the subject, though he has been of age since January 1849, he has done no act to repudiate his deed. He had more than fourteen years, before putting in the defence to this action, within which to decide if he would avoid the conveyance made by him, and his taking no steps to do so would certainly be evidence to go to a jury that he had affirmed the deed. When anything passes to an infant by a deed, it is clearly his duty to repudiate it within a

reasonable time, unless he wishes to be considered as affirming it, and if it is equally imperative on him to disavow the deed if he does not intend to be bound by it. The deed being good until it is repudiated, those who hold an estate under it, after a reasonable time has elapsed, are warranted in assuming that it is not the intention of the grantor to avoid the deed, and they would then go on and improve the estate; but if, after making valuable improvements, the grantor were allowed to repudiate the deed, and take back the land, it would be working a gross injustice. If the purchaser from the infant could not infer, after a reasonable time, that the infant confirmed his deed, the effect would be that he would be deterred from cultivating or improving the property, and this certainly would be contrary to the well established rule of law, that it is the interest of the public that land should be cultivated and improved. In *Holmes v. Blogg* (8 Taunt. 38), Dallas, J., said: "I agree that in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and if the case before the court were that simple case, I should be disposed to hold that as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance within reasonable time." It is true, that was a case relating to the purchase of a lease, but I see no reason why the language, general as it is, may not properly apply to disaffirming any contract which is only voidable. The case of *Slator v. Brady* (14 Ir. C. L. Ex. 61) decides, that giving another lease, after the lessor became of age, of the same premises for the same period of time, and perhaps something more, does not necessarily repudiate the first lease, granted whilst the lessor was an infant: the lease could only be avoided by some notorious act, such as ejectment, entry, demand of possession, or the like, or at least notice. A voidable deed is valid until some act is done to avoid it, and it lies on those who claim in opposition to the deed to shew that such act has been done: *Allen v. Allen* (2 Dru. & W. 307), S. C. (1 C. & L. 427), is authority for this proposition.

As Alexander McDonell did not do any act for fifteen years after he became of age to avoid this deed, I think that

is evidence to go to a jury that he affirmed it, particularly as it is not pretended that he lived abroad, or, living in that neighbourhood, was not in a position to do some act to avoid the deed, if he desired to do so. As we are to draw inferences of fact, I think we may well assume, from the evidence that he did affirm the deed. If so, his putting in the defence to this action now, cannot, as already remarked, avoid it, as in our view of the facts, it had become a completely affirmed deed long before the bringing of the action.

Is this deed one out of which an estoppel can arise? It is not like the deed in the cases of *Todd v. Cain* and *Doe McGill v. Shea*, where all that the deed purported to convey was simply the right of the grantor in the land, and where the bond which accompanied it shewed clearly that he had not any *title* to the land. But here, by the words of the deed and by virtue of the statute, the grantor, in consideration of £100, grants the lot and all houses, &c., profits, emoluments and appurtenances whatsoever to the land belonging, and also the reversion or reversions, remainder or remainders, rents, issues and profits of the same, and every part and parcel thereof, and all the estate, &c., both at law and in equity, of the grantor in the land, and every part thereof, to Isabella McDonell, her heirs and assigns, forever. It is true, there are no covenants for seisin or further assurance, but the instrument for a valid consideration purports to grant the land to the grantee forever. On the face of it the grantor does not assume to do more than grant the land, and all his right to it. The reasoning of Sir J. B. Robinson, in *Doe Irvine v. Webster*, shews clearly that the doctrine of estoppel applies to a deed in the form that this is, whether it operates as a *grant* or as a deed of bargain and sale, for it purports to grant the land itself, and not merely any supposed claim which the grantor may have to it.

In principle, then, I see no reason why the defendant should succeed in this action. If he had owned the land when the deed of 1847 was executed, the estate would have vested in Isabella McDonell by virtue of that deed, though defendant was an infant when he made it; and in 1860, when the mortgage to plaintiff was made, from the lapse of

time that had intervened from the date of the deed to Isabella McDonell, it would be assumed that he confirmed that deed after he became of age, then her title would have been perfect. As soon as the deed to Isabella became the valid and effectual deed of the defendant, I see no reason why it should not operate by way of estoppel; and then as soon as he acquired the title by the deed of 1863, that title at once passed to the Assignee of Isabella McDonell, the present plaintiff, and perfected his estate.

It may be urged that Alexander, after he became of age, discovered that he had no title to the land; and as he had given Isabella no covenants for title or further assurance, he had no particular interest in avoiding the deed, and therefore took no steps to do so; that he knew he could not successfully bring ejectment, as she did not enter under his deed, and, therefore, there were no steps he could take to avoid it. There is no reason why he should not have given a notice to avoid it, if he desired to do so, and if he thought the deed would do him no harm, as he had not given any covenants, that would seem to be a good reason why he should take no trouble to avoid it; that being indifferent about it, he did not care to avoid it. As he did nothing to avoid it, the authorities would seem to justify a jury, and the court now, in inferring that he did not intend to avoid it, and consequently that he affirmed it.

Such being the state of things, he has no right to complain now, when he purchases apparently for \$50 the same property which he sold for £100 years ago, when he had no title, that the law will not permit him to keep it, but transfers the same by virtue of the deed he made so many years before, and which he never up to that time had repudiated. If the doctrine of estoppel never works more injustice than it apparently does in this case, it will not be very abhorrent to the law.

Our attention has been directed to the case of *Grace v. Whitehead* (7 Grant, U.C. Chancery cases, 591), which seems to assume that the deed of an infant is absolutely void. We do not think that the lamented Vice-Chancellor Estlin intended to affirm that as a generally established legal proposition. It was not necessary for the decision of the case

before him that such a view of the law should be upheld, for he sustained the right of the mortgagee to recover the purchase money of the premises covered by the mortgage, on the ground that the unpaid vendor could do so without the aid of the mortgage.

We are of opinion that the rule absolute to enter a verdict for plaintiff should go.

Rule absolute to enter a verdict for the plaintiff.

GRAHAM V. STEWART.

Commission to take evidence—Enclosure open at both ends—Admissibility in evidence—Mistake in style of cause fatal—New trial.

A commission to take evidence, which is produced at the trial contained in an envelope open at both ends, though otherwise well secured, and under the hand and seal of the commissioner, is properly admitted in evidence, it appearing that it arrived at the Toronto post-office in that state, and there being no suspicion of its having been tampered with by either of the parties interested.

Held, also, that it is always open to a party to explain to the satisfaction of the presiding judge how an enclosure of the kind became open, and that the reception of it in evidence being a matter resting very much with the judge, the court will not be disposed to interfere with him in the exercise of his discretion.

Held, also, that a mistake in the entitling of the cause in the commission (the defendant having been styled *William* instead of *Samuel*) was fatal to it; that the taking of the evidence under it was a void proceeding, and the evidence not entitled to be treated as binding, though taken under oath; and that the jury having probably been greatly influenced in their verdict by the evidence so taken, a new trial ought to be granted.

This was an action for money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff, and for money due on an account stated, to which the defendant pleaded never indebted.

The cause was tried at the last fall assizes for York and Peel before Mr. Justice John Wilson, when a verdict was found for the plaintiff and \$162 damages.

On behalf of the plaintiff a commission, under which evidence had been taken, was produced at the trial.

The plaintiff's counsel proposed to open the commission: the package appeared to have been torn at the ends: Mr. Campbell, the clerk of assize, stated that he received it so from the clerk (of the Court of Common Pleas), who stated

that so far as he could learn it had been opened at the lines by the American authorities.

Edward Bennett sworn, said: "I am a clerk in the post office: this packet came yesterday in this state: I made the memorandum: I got the letter and the newspapers: the mail bag was opened by the clerks in the inner office: I can't say in which bag it came."

It was opened subject to the objection, and when opened, it was objected that the defendant was called *Daniel* instead of Samuel in the affidavit of execution, and that he was called *William* in the body of the commission. It was thereupon decided that the commission should be withheld for a time: if put in it was to be subject to these objections.

One James B. Hall was then examined *viva voce*.

R. A. Harrison next proposed to amend the error in the commission. He produced the order for the commission to amend by. The learned judge thought that he had no power to amend. The commission was then put in and read subject to the objections.

J. H. Cameron, Q.C., had leave reserved to move to enter a nonsuit on the grounds of objection taken, should there be no other evidence to maintain the action. *Mr. Cameron* further objected that the affidavit of the taking was not properly entitled. The evidence under the commission was read.

In Michaelmas Term last, *J. H. Cameron, Q.C.*, moved for and obtained a rule calling upon the plaintiff to shew cause why a new trial should not be had, on the ground that the evidence taken under the commission was improperly received, as the commission was not issued in the proper style of this cause; that it was not returned close; and that the affidavit of due taking was not entitled in the cause; and on the ground that the verdict was against law and evidence; or why a nonsuit should not be entered on the leave reserved, on the ground that the plaintiff could not, on the facts, sustain his count for use and occupation, but should have declared specially according to the facts.

During the present term *Robert A. Harrison* shewed cause. He referred to many authorities as to the plaintiff's right to recover for use and occupation as he had declared;

but *Cameron*, for the defendant, said he would not further press this point, and that would rely only on the inadmissibility of the commission.

Harrison then referred to the case which he had cited and commented on in the previous term, in *Frank v. Carson*, * as supporting the regularity and the admissibility of the commission had been and were now rejected there was still sufficient evidence to have justified and sustained the finding for the plaintiff; *Bruff Connybeare*, 13 C. B. N. S. 263, S. C. 9 Jur. N. S. 78; *Stindt v. Roberts*, 5 D. & L. 460, S. C. 12 Jur. 518.

Cameron, Q.C., contra.—The commission should not have been admitted at the trial: it was not *close* as required by the statute. It is not a commission in this cause, nor are the affidavits properly entitled. If the commission were not admissible there must be a new trial, because the evidence which was read under the commission was material to the plaintiff's case, and was read by him when he feared his case would break down, and in order to prevent a motion for a nonsuit being made; and if any evidence were admitted, which should not have been admitted, the court will not weigh what the precise effect of that evidence may have been, but will set aside the verdict altogether: *Ganton v. Size*, 22 U. C. Q. B. 473, 2 Err. & App. Rs. 368.

A. WILSON, J., delivered the judgment of the court.

The objections to the commission are 1st, That the commission and the papers relating to and accompanying it were not *close*; but were merely folded up and put inside of an envelope, which, although fastened round with tape and properly sealed, was nevertheless open at each end, apparently torn open, so that the enclosures could easily have been taken from it and replaced.

2nd, That the commission was issued in a cause of William Graham plaintiff, and *William Stewart*, the younger, defendant, which was not this cause, and

3rd, The two affidavits of the taking of the evidence and of the due execution of the commission were entitled in

* See pp. 145-147.

the cause of William Graham, plaintiff, and *Daniel Stewart* the younger, defendant, which was not this cause.

The commission was in this state when it came in the mail bag to the post office, and the clerk in the office so noted the fact upon the envelope. The commissioners had apparently done their duty by returning the commission to the court from which it issued close under hand and seal, that is, by placing it in the post office for transmission to the court, which has always been held to be a *returning* by them within the meaning of the statute; and no doubt they so returned the commission properly closed up as letters and closed packages usually are closed; for the judge's notes shew, as the fact most probably is, that the parcel was opened in the United States, and no doubt by some of their authorities, in consequence of the present disordered state of that country.

In *Frank v. Carson* we were of opinion that as the envelope had not been opened sufficiently to permit the enclosures to be withdrawn, we would not say it had not been returned *close* within the meaning of the statute; and we also intimated our opinion, that as it had not been shewn in that case that the parcel had been delivered to the clerk of this court in the state in which it was when it was produced at the trial, and as the parties had by the order in that case the right to open the commission after its delivery into this court, and to take office copies, we would not, perhaps, presume, in the absence of any explanation to the contrary, that the commission, if opened at all, had not been opened in that manner: it might have been rightly so opened, and the maxim *omnia rite esse acta* ought therefore to be applied.

The order for the commission is in this case in the same form; but there can be no such presumption made here, for the clerk in the post-office says that the parcel arrived there in the same condition in which it was afterwards delivered out of the office.

We must, therefore, determine whether a commission returned, as this one has been, properly by the commissioners, but opened in the course of transmission, either by accident or by design, by no one either a party to or in any way

whatever interested in the cause, or in either of the parties to it, must be rejected.

The statute requires that the commission shall be returned *to the court* close under hand and seal. The commissioners have, so far as they could, returned it to the court, according to the requirement of the statute; but it has not, in fact, reached the court *close*, &c. If it had come to the court fully closed up, it might still have been rejected, "if it had been made to appear to the court that the same had not been duly taken;" for the formal and full return required by the statute is not conclusive, by only *prima facie* evidence that the commission had been duly taken, executed and returned. We are not, therefore, of the opinion, that the mere fact of the commission not being turned into court intact, must necessarily be a cause for rejection; for if the clerk or messenger, after having received it at the post-office in a perfect condition, were by mistake to tear it open, thinking it was another parcel, or were it to meet with any other accident, by which that which was *close* became open, we think, upon an explanation of the fact to the satisfaction of the court, that the commission might be rightly received in evidence, as having been duly returned to the court. So we think if some such accident were to occur in the post-office here, it might also be received upon the like explanation being given; and so we think the commission might be traced farther back, and if it could be shewn that the damage which had been done to it had happened in the railway cars, or in the foreign post-office, it would be equally in the discretion of the learned judge to admit the evidence; for we think he might admit it if it were brought into court by the commissioner in his own person although not *close*.

While, therefore, a commission in the present form is subject to observation, and, perhaps, to a considerable degree of suspicion, we are not prepared to say that when the commissioner has done all that he was required to do to have the commission duly returned to the court, that every accident happening to its enclosure shall necessarily exclude it from being received in evidence, notwithstanding the most satisfactory explanation is afforded that it was by accident, and that there has been no tampering with it by the parties,

or by any one of them, or the remotest cause for suspecting any such conduct.

The question must rest very much with the presiding judge, in every case, according to the facts; and judging in this manner, we are not disposed to interfere with the discretion exercised by the learned judge on this occasion: *Cox v. Newman* (2 V. & B. 168).

The next objection, that the commission is not properly entitled in the cause, the defendant being styled *William Stewart the younger*, while his proper name, and the name by which this suit is carried on, is *Samuel Stewart the younger*, we think is a fatal objection. There is no such cause as the one specified in the commission, or at any rate it is not this cause; and we think the evidence taken under it, whether the witness would be punishable or not if his evidence were false, has not been taken in such a manner as entitles it to be treated as binding: although it was apparently given under the solemn sanction of an oath, it is, as it now stands, a void proceeding, so far as this cause is concerned.

It is not necessary to refer to the objection to the entitling of the affidavits of caption.

We are, therefore, compelled to say whether the evidence which was read under the commission had any influence upon the verdict which was rendered; for if it had, the defendant will be entitled to a new trial: *Rutzen v. Farr* (4 A. & E. 53.)

The question at the trial was, whether the lease of the property in question was made by the plaintiff to the defendant, or to his brother, William Stewart. The *viva voce* evidence would have well warranted a finding for the plaintiff; but if the verdict had been for the defendant, we could not say it had been given against the evidence. in this state of the testimony, the additional and very conclusive evidence of Prosser, the witness who was examined under the commission, may have had the greatest influence upon the result of the trial. He declares that he drew the lease at the request of the plaintiff and the defendant, who were both present at that time, and he tells why William was not to be the tenant: he says that the defendant assented to the

terms of the lease, and that he then acknowledged himself to be in the possession of the property, and William Stewart to be his agent. All this evidence was to the very point of the controversy, and must, or at any rate may, have very greatly influenced the jury in the verdict which they found.

The rule must, therefore, be absolute for a new trial, without costs.

Rule absolute for a new trial, without costs.

DATE V. GORE DISTRICT MUTUAL INSURANCE COMPANY.

Alteration in insured premises—Balancing of risks.

Where one of the conditions of a policy of insurance was, "*if the risk shall be increased by any means whatever, or if the buildings shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void,*" and after the effecting of the insurance certain alterations were made in the premises insured, consisting of the removal from one room to another adjoining it of a couple of dye-kettles, a different disposition of the flues and pipes connected therewith, and the erection of a new chimney, thereby to a slight extent increasing, (if considered as an isolated act,) but to a great extent diminishing, the risk, and the jury found that, though the erection of the chimney did *per se* increase the risk, yet that diminishing it in one place and increasing it in another the risk on the whole was not increased, and rendered a verdict in favor of the plaintiff, *Held*, (distinguishing *Heneker v. British America Insurance Company*, 13 U. C. C. P. 99) that there was no good reason why the jury should not have found as they did, and a rule to enter a verdict for the defendants was refused.

The pleadings in this case will be found in 14 U. C. C. P. 502.

The cause was again taken down to trial before the Chief Justice of Upper Canada, at the last fall assizes for the county of Waterloo, when a verdict was rendered for the plaintiff for \$2,596.

The only question which now came before the court was the issue on the third plea, alleging that the risk in the goods insured was increased, and much more hazardous than at the time of effecting the insurance.

As far as the evidence given at the trial was applicable to that issue, it appeared that at the time the insurance was effected there were three dye-kettles placed in the room or building on the premises, on which premises were the goods covered by the policy. The sides of this room were of stone, the ends of wood: the kettles were set on bricks, which were placed on the floor of the room, which was of plank: there

was a flue from each kettle, that led into a tin or iron pipe, that passed up through the ceiling of the room, and thence into the chimney. In the room above the ceiling there was a good deal of wood and greasy matter about. This pipe had set fire to the place before the change in the position of the flues and kettles; and it was thought desirable to alter the dye-kettles and pipe, both for the sake of making the premises more secure from fire, and because they wanted more room in that particular part of the building.

After the policy was granted, and before the fire, two of the dye-kettles were taken from the room where they had been, and were placed in an adjoining room or building on the same premises, where the sides of the room were also of stone and the ends of wood. The foundations on which they were placed were of stone, on the rock up to the water-line, and above that of brick. There were two flues, the smoke from one of which went, without any pipe, into a brick chimney directly; while from the other the smoke was led by a tin or iron pipe into the same chimney. The third kettle remained in the room where it was first placed, and was used for heating water; but the pipe, instead of leading through the ceiling into the room where the wood and grease and waste of the woollen factory were, was so altered as to lead directly into the chimney, and did not go within two and a half feet of the ceiling above. There was three times as much pipe on the premises before the alteration as there was afterwards, and the pipes, chimneys, &c., were all well secured. There were two places in which fire was kept instead of one, and two chimneys leading through the roof instead of one; and the last place where the two kettles were put was a little nearer where the tools destroyed by the fire were kept, than the first was.

For the defence it was objected, that plaintiff's case was based on the assumption that he had a right to balance risks, and if he had no such right, he had proved no cause of action; for he had proved that in one place he had increased the risk.

The learned judge declined to nonsuit, and, as appears from the note of his charge, proposed to put the question broadly to the jury, whether the alteration increased the risk, all being changes within the building by taking away furnaces

and kettles from one place to another. He finally concluded to put the questions to the jury as follow: 1st, Was the risk increased by the fact of a new chimney being erected where none was before? 2nd, Whether the diminishing of risk, if any, in one place, counterbalanced the increase of risk by the new erection in the other, so that on the whole there was no increase of risk?

The jury found that, as the facts were, by the diminishing the risk in one place and increasing it in another, the risk was not increased; that the erection of the new chimney, &c., without reference to the old erections, did increase the risk: they found, as mentioned already, for the plaintiff, damages \$2,596.

Leave was reserved to the defendants to move to enter a verdict for them, if, in the opinion of the court, the finding as to the increased risk in law entitled them to a verdict.

In Michaelmas term last, *Anderson*, pursuant to leave reserved, moved for and obtained a rule *nisi* to enter a verdict for the defendants, on the ground that the facts as found by the jury amounted to a finding in favor of the defendants.

The rule was enlarged until the present term, when

Freeman, Q. C., shewed cause.—The question of whether an alteration increases the risk or not must always be a question of fact, and must be more or less a question of the balancing of risks. If the insurance company had stipulated, as it appears some company do, that there should be no alteration of any kind in the premises during the term of the insurance without notice to them, then a mere alteration would vitiate the policy; but when the condition is, "*if the risk shall be increased* by any means whatever, or if the buildings shall be occupied in any way *so as to render the risk more hazardous*," then the question of increase of risk, or of the risk being more hazardous, must always be for the jury, and a comparison must always be made, and a conclusion drawn, whether, using the premises as they were after the alteration, and comparing them with what they were before, there has been an increase of risk. The isolated fact found by the jury, that building a chimney in a house, and using fire in it, would increase the risk, taken by itself, might possibly justify a jury in finding for the defendant under

this plea; but if it was shewn that a stovepipe had passed through the roof, or out of the side of the building, and the chimney was erected and used instead of using the stove and pipes as before, it would be absurd to say that the jury should not make the comparison, and say whether or not the risk had been really increased. *Heneker v. The British American Insurance Company* is distinguishable: there, there was the construction of an additional building, thirty by forty feet, adjoining the assured premises; and it was contended for the plaintiff that inasmuch as certain heating apparatus for the dyeing-house had been taken out of the insured premises and placed in the new erection, and was better secured in the new building than it had been in the old, therefore the improvement, as to the securing of the heating apparatus, overbalanced the increased risk of a wooden building thirty by forty adjoining the insured premises, and did not require a notice. This case is clearly distinguishable from that, for no alteration was made in the corpus for the premises, and all that is really in dispute is whether the change in the position of the heating apparatus itself has increased the risk, or, in other words, whether removing the fire causing great heat from two flues that passed into a tin or iron pipe, by which pipe the floor had been previously set on fire, and placing it in two others in an adjoining room, constructed of similar material to the other, better secured in every way, and leading it into a good brick flue, it *per se* increasing the risk by the change. There can be no reasonable doubt that it is not increasing the risk, looking to the premises as they existed before the change. He referred to *Heneker v. British America Assurance Company*, 13 U. C. C. P. 99; *Glen v. Lewis*, 8 Ex. 607; *Berkendale v. Harvey*, 4 Ex. N. S. 445 450; *Stokes v. Cox*, 1 Ex. N. S. 353; Kent's Commentaries, vol. 3, 377; *Merriam v. Middlesex Mutual Fire Insurance Co.*, 21 Pick. 162; *Grant v. Howard Insurance Co. of New York*, 5 Hill, 10.

Moss, contra.—The case of *Heneker v. British America Assurance Company*, referred to, in effect disposes of this case, and cannot be distinguished in principle from it. He cited Angell on Insurance, 207, and commented on the case in 4 Mass. Rs.

RICHARDS, C.J., delivered the judgment of the court.

The condition of the policy set out in the third plea of the defendant is to the following effect : “ If, after insurance is effected, the risk shall be increased by any means whatever, or if the buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void ;” and the defendants in that plea aver that subsequently to the effecting of the policies, and during the time they were in force, and prior to the alleged loss, plaintiff, without defendants’ knowledge or consent, erected in a certain wooden building in the rear of and annexed to the premises wherein the goods insured were situated, certain dye-kettles and furnaces thereunder, and kept and used the same therein until the occurring of the fire ; and by means of the erecting and continuing such dye-kettles and furnaces in said buildings, and using the same as aforesaid, the risk upon the goods, &c., insured as aforesaid, became increased and much more hazardous than at the time of effecting such insurance ; and as defendants were not notified of such erection and continuing of said kettles and furnaces, and did not ratify or approve of the same, the policy became void.

In *Hencker v. The British America Assurance Company* the third plea stated, that after the insurance divers buildings and erections were added to buildings assured, and by such erections and buildings, which were within the control of the plaintiff, the risk of the defendants was increased without their knowledge or consent, and without allowance by endorsement on the policy. The evidence in that case shewed the erection of additional buildings adjacent to the insured premises, one of them of wood, forty feet long by thirty feet wide ; and there extensive additions, no doubt, increased the risk, as affording a larger surface of wooden materials exposed to fires in various ways. But the plaintiff contended he had removed from the interior of one of the assured buildings certain heating apparatus and dyeing-kettles and placed them in the adjoining building, and they had them secured in a much more careful and safe manner than when in the other building, and, therefore, that as the risk in the factory building dye-house insured was diminished

that should be taken into consideration, and the whole risk, considered not increased. The court in that case held that it was not proper to strike a balance between the increased risk caused by the erection of the buildings outside of the insured premises, and the diminished risk inside of the premises, from the improved mode of heating the dying apparatus ; that the company had the right to say if they required additional premium on account of the acknowledged additional risk from the erection of the buildings of wood adjacent to the insured premises ; and as they have expressly stipulated that any alterations increasing the risk should avoid the policy unless assented to by them, their defence was made out.

But in the case before us there is no additional building erected, no additional heating process used ; but the same number of kettles used, the same number of flues : but instead of all entering into a tin or iron pipe passing through a ceiling of the room, and exposed to contact with the waste and grease of a woollen factory, and thence into a flue, and that so badly protected that it had set the place on fire, we have two of the flues removed to another room, and conducted either directly or by a stovepipe into a new brick chimney, and the third one removed from passing through the ceiling and conducted directly into the chimney, and distant two and a half feet from the ceiling, less stovepipe than before, and all apparently better protected from accidents by fire than before. This case, it seems to me, differs essentially from *Heneker v. The British America Assurance Company*. Suppose that the whole of the kettles had been removed from where they stood at the time when the premises were insured, and had been placed in the adjoining room, and were better secured than before ; after the fire I suppose the defendants might have pleaded that after the insurance had been affected and before the fire, the plaintiff had erected dye-kettles, furnaces, &c., in certain adjoining wooden buildings, and if the jury had been asked to say, as an isolated fact, would not such erection of dye-kettles and furnaces in a building increase the risk, they would be obliged to say it would. But if asked to say, whether by such change of the heating and dying apparatus, badly

secured as it was at first, and passing through the room where the waste and grease were, to a position where they would be removed from contact with such inflammable materials, and be secured in a more safe and substantial manner,—if asked to say, if by such a change the risk was increased, they would say not. Then if in that state of facts the jury would be warranted in looking at the position of the heating apparatus before and after it was wholly changed, may they not be at liberty to say whether the removal and change of two of the flues increases the risk or not? I see no good reason why they may not so decide on this matter without violating any settled rule of law, or working injustice to any one.

If the fact that any change, which, taken by itself, may be considered as adding to the risk, but which, being considered in relation to what existed before the change, does not really add to the risk, is to be considered as vitiating a policy, then this result may follow: where the owner of a house, when it is insured, heats a particular room by a fire-place, and afterwards puts up a stove in that room, and warms it with the stove instead of the fire-place, then, as having a stove in a room with a fire in it adds to the risk, the policy would be void, whereas the actual risk from the change from the fire-place to the stove may be positively diminished, particularly in those parts of the country where wood is used as fuel instead of coals.

The very words of the condition of the policy contemplate that changes may take place in relation to the premises after they are insured; and if such changes do not increase the risk, or make it more hazardous, then it is not intended that the policy should be void. The allegation in the third plea, that by means of the erecting and continuing of such dye-kettles (which, according to the facts, ought to be, by means of the change and alteration in relation to such dye-kettles), the risk upon the goods, &c. insured, became increased and much more hazardous than at the time of effecting such insurance, is a material one. The jury have in substance declared that such erections or changes have not increased the risk, and we see no reason for finding fault with their verdict in this respect.

There seems to me to be a broad distinction in saying whether a change in the interior arrangements of a building increases the risk of accidents by fire or not, taking all the circumstances in relation to the building and the change of arrangements into consideration, and saying, the erection of wooden buildings of certain extent adjoining a brick factory increases the risk to the factory undoubtedly, but, by the improved mode of heating the dyeing-kettles in the factory, the risk as to that is diminished, therefore the risk to the company is not increased. In the latter case there is a sort of balancing of risks, or setting one off against the other. But where there is a change of a stove from one room to another, and in each room equally well secured, can it be said that by that mere change the risk is rendered more hazardous than it was before; and if not, then if two stoves or dyeing-kettles are changed from one room to another, and are more safely secured than they were before, and all are made less liable to accidents from fire than before, can that change be fairly said to increase the risk, and make it more hazardous than before? I think not.

On the whole, we think this rule must be discharged; and in arriving at this conclusion we do not consider that we disturb in any way the law as laid down in *Heneker v. The British America Assurance Company*, but we are preventing that case from being referred to as authority for sustaining positions inconsistent with reason and justice.

Rule discharged.

McLAUGHLIN v. McLAUGHLIN.

Jurisdiction of common law judge as to feigned issues—Refusal by court to grant a new trial, where issue directed by judge.

A common law judge has no power, unless where given him by statute, to direct a feigned issue to be tried by a jury: the most he can do is to refer the parties to the full court for the required relief, or, perhaps, to grant a summons returnable in court. As he cannot grant a new trial himself, so he cannot, by creating a proceeding of the kind, confer this jurisdiction upon the court, which will therefore refuse to interfere.

This was a feigned issue, joined between the parties, and ordered to be tried by virtue of a judge's order, made on the 24th September, 1864, for the purpose of determining

the amount of a judgment which had been recovered by the now defendant as administrator of the goods and chattels of James McLaughlin, deceased, against the now plaintiff, for the sum of £191 13s. 9d. damages, and £29 5s. 6d. costs, in this court, on or about the 30th November, 1857, and the interest thereon, or whether any and what part of such amount had been paid by the now plaintiff, or by any one on his behalf.

The trial took place before Morrison, J., at Cobourg, at the last fall assizes, when a verdict was found for the plaintiff.

In Michaelmas term last, *H. Cameron* obtained a rule *nisi* upon the plaintiff to shew cause why a new trial should not be granted, on the ground that the verdict was against the weight of evidence, and had been obtained upon evidence which was untrue, as appeared by the affidavit filed. The rule was granted, for the purpose of having discussed the jurisdiction of a judge to make such an order, the court having referred to the case of *Hammel v. Goldburg*, with the trial of which Burns, J., at the Hamilton assizes, in 1862, refused to proceed, upon an objection of this kind being raised.

C. S. Patterson shewed cause.—It is not desired to object to the want of authority in the judge. The court, however, has no control over the issue, and cannot grant a new trial, because it is an issue which has been ordered for the information of the judge himself, to enable him to decide more satisfactorily whether he should order satisfaction to be entered on the roll or not, and any application for a new trial should have been made to him.

H. Cameron, in support of the rule.—The plaintiff in this issue having drawn up the order and taken the case to trial, cannot now object to the proceeding: a judge should have the power to direct such an issue to be tried. He referred to *Wilson v. Wilson*, 2 U. C. Pr. Rep. 574; *Armour v. Carruthers*, 2 U. C. Pr. Rep. 217; *Klein v. Klein*, 7 U. C. L. J. 296; *Reynolds v. Shuter*, 10 U. C. Pr. Rep. 286.

A. WILSON, J., delivered the judgment of the court.

This case was argued also very fully on the evidence and merits, and affidavits were filed on both sides in support of

and against the granting of a new trial ; but we do not think it necessary to observe upon this branch of the rule, because the case itself must be disposed of on the more important preliminary objection to the jurisdiction of the learned judge who granted the order, and, as a consequence, to our own jurisdiction, also, to regulate and control or to adopt in any way the proceedings which have been taken.

In the case of *Wilson v. Wilson*, the issue was ordered by the Practice Court, which has the jurisdiction of the full court, and not by a judge. In *Armour v. Carruthers*, no issue was ordered at all, but a summons, which was granted by a judge in Chambers, was made returnable in the full court, which is every day's practice. In *Klein v. Klein* the issue was ordered by the Practice Court, but in *Reynolds v. Streeter* the issue was tried under a judge's order.

There is then only this one case in favor of the jurisdiction, and the case of *Hammell v. Goldberg*, before referred to, directly raising the point, is against it.

The courts of law and equity have for a very long time exercised the power of directing feigned issues to be tried, for the purpose of determining disputed facts, and this was the course which was also adopted by the Master of the Rolls, when he wanted the opinion of a court of law, until Lord Kenyon, C. J., altered the practice, and received a case directly from that court, holding the former practice to have been "an idle formality." (6 T. R. 313.)

We are not aware of any case, unless when acting under the express direction of a statute, as in interpleader cases, of a common law judge having exercised the authority, in his individual capacity, of sending an issue to be tried by a jury. If he can do this, then he ought to be at liberty to grant a new trial, or to have the power to confer upon the court this right; but this is the very point in question.

We have no doubt he cannot himself grant a new trial, and we think he cannot himself originate a proceeding of this kind, and thereby confer authority over it upon the court.

The reason why courts of equity have exercised the power is, because they had no means of summoning a jury to try such matters: they were obliged, therefore, to invoke the

aid of the common law courts, and it is the duty of each court to act in the aid and assistance of the other courts within their respective recognized limits.

But this cannot apply to a common law judge, for all he has to do is to refer the parties to the full court for the relief, or, perhaps, to grant a summons for the purpose, returnable in the full court for final disposition there.

The authority of a judge at Chambers has long been exercised (Wilmot's Opinions, 264); and it probably arose as much from necessity as from convenience, just as the sittings of the Court of Queen's Bench in England came to be held in *vacation*, and before Hilary, Easter and Michaelmas terms, to hear arguments, upon which the judgments were given in the following terms (Tidd's Prac. 9th ed. 39); but it has grown only by degrees: it was not until the case of *Doe dem Prescott v. Roe* (9 Bing. 104), S. C. (1 Dowl. 274), that it was fully established that a judge in Chambers had the power to award costs; and it will not be found to have extended the length of ordering the trial of such an issue. The case of *Shaw v. Roberts* (2 Dowl. 25) is very much in point: there the court would not allow cause to be shewn to a rule in Chambers for an interpleader on behalf of the sheriff, because the sheriff's clauses did not at that time give authority to a judge to order such an issue.

As there has been a trial in fact, and as the object of the order was to satisfy the conscience of the learned judge upon certain disputed facts, the proceedings that have been taken may not be wholly lost, for no doubt the learned judge may now, with the additional information which he has obtained, be able satisfactorily to dispose of the application which is in reality still depending before him.

Although we believe the power which has been exercised here might very safely be committed to the judges, as it is in no respect greater than the powers which have been already specially conferred upon them, we think they do not possess now such a power.

The parties may, therefore, apply again to the learned judge. We must discharge the rule.

Rule discharged.

15 U. C. C. P.

MILLER ET AL. V. THOMPSON.

Sale by individual members of a company of their personal interests therein
—*Legality of—Pleading.*

The declaration represented the plaintiffs and one C. to have individually associated themselves together for the purpose of procuring an act of incorporation as a Gas Company, which they succeeded in obtaining; that for this and other services rendered they had acquired a claim against the company to a certain amount; that they were individually possessed of certain books, &c., belonging to themselves, relating to the company, and that at the request of the defendant and one H. they agreed to surrender and did surrender to defendant and H. 1. All their said claim against the company. 2. The subscription list. 3. The books, &c., of the plaintiffs. 4. As far as they lawfully could their right, title, interest in, or control over, the assets of the company, and the charter of incorporation; for all of which the defendant and H. jointly and severally bound themselves to pay the plaintiffs \$3,000.

Held, on demurrer, that the declaration was good; for the sale alleged was not of the franchise and charter of the company, but of the mere claims of the plaintiffs thereon, and their personal rights and interests in the concern.

The declaration recited that before the making of the agreement afterwards mentioned, the plaintiffs and one Callaway associated themselves together for the purpose of carrying on business in Toronto, as a gas company, under the name of the Metropolitan Gas Company; that by the means and procurement, and at the expense of the plaintiffs, they obtained an act of parliament incorporating the said company; and that the plaintiffs and Callaway having so obtained the act of incorporation, they, the plaintiffs, afterwards at great expense, procured a certain subscription list, containing promises of divers persons to purchase gas from the said company, and expended large sums of money in obtaining subscriptions ther for, and in and about the publishing and advertising of the company, and in purchasing materials and necessary things for bringing the company into operation, and in and about the business of the company; and having a claim against the company for moneys so expended by them amounting to, to wit, \$3,000, and being also possessed of certain books, documents and papers belonging to the plaintiffs, in connection with and relating to the company, the defendant and one Hind, proposed to the plaintiffs that the plaintiffs should sell and transfer to the defendant and Hind all the plaintiffs' claim against the company, and give up and deliver to the defendant and Hind the said subscription list, and deliver to them the said

books, documents, and papers of the plaintiffs; and should surrender and relinquish to them, as far as the plaintiffs lawfully could or might, all the plaintiffs' right, title, interest in, or control over, assets of the company, and the charter of incorporation thereof, for the sum of \$3,000, which the defendant and Hind proposed to pay to the plaintiffs in two years, which proposal was then accepted by the plaintiffs.

The plaintiffs then averred performance of all these acts by them, and the acceptance of them by the defendant and Hind, and they alleged that in consideration of this liability, and that they would give day of payment, and in consideration of the premises, that the defendant and Hind, by an agreement in writing, signed by them, dated the 15th of June, 1862, promised jointly and severally to pay to the plaintiffs the said sum of \$3,000 two years after the date thereof; but although the two years had elapsed before the commencement of this suit, neither the defendant nor Hind had paid the same or any part thereof.

The defendant demurred to this count, because it shewed no legal consideration for the making of the promise or agreement alleged, and no binding promise on the part of the defendant, and because the alleged transfer of the charter of incorporation was contrary to public policy.

H. Cameron, for the demurrer, referred to Chitty on Contracts, 580; *Peto v. Welland Railway Company*, 9 Grant, 455; Grant on Corporations, 295; *Johnson v. The Shewsbury and B. R. Co.*, 22 L. J. Chy. 921, S. C., 17 Jur. 1015; Redfield on Railways, 574.

Robert A. Harrison, contra.—The consideration is not immoral or illegal: *Richardson v. Mellish*, 2 Bing. 229; Com. Dig. "Grant," C. This sale would not extinguish the franchise: Redfield on Railways, 574; *Winch v. Birkenhead Railway Co.*, 16 Jur. 1035; *Allan v. Montgomery Railway Co.*, 11 Al. 437; *Worcester v. Western Railway Co.*, 4 Met. 564. There are other considerations besides the one which will support the transaction.

A. WILSON. J., delivered the judgment of the court.

If this is to be considered as the case of a sale by an incorporated company of its rights, franchise, and charter, the

defendant will be entitled to judgment on this demurrer; because nothing is more clearly settled than that such an assumption of power, unless expressly within the terms of the act of incorporation, is wholly unauthorized and therefore void because contrary to the purposes of the charter.

The declaration does not profess to disclose a transaction of this kind: the question is whether it does so in effect or not. It represents the plaintiffs and one Callaway individually as having associated themselves together for the purpose of procuring an act of parliament, incorporating them as a gas company, and that they succeeded in being so incorporated: then it represents that in procuring this charter, and in forwarding the business and position and prospects of the company they had acquired a claim against and a right of recompense from the company to the extent of \$3,000, and that they were individually possessed of certain books, &c., belonging to themselves, relating to the company, and that they, at the request of the defendant and Hind, agreed to give up, and did give up to the defendant and Hind, first, all their claim against the company; second, the subscription list; third, the books, &c., of the plaintiff, and fourth, as far as they lawfully could, the plaintiffs' right, title, interest in or control over, the assets of the company, and the charter of incorporation, for which the defendant and Hind bound themselves jointly and severally to pay to the plaintiffs the sum of \$3,000.

The statute of incorporation of this company (24 Vic., ch. 101,) constitutes the three plaintiffs and Callaway, or such of them and such other persons as shall become shareholders in the company, a body corporate. The capital of the company is \$500,000, and the shares are \$50 each. We cannot, therefore, say that these four named persons alone constitute the company; and, for anything we know to the contrary, there may be many hundreds of shareholders, and a full body of directors, and the company in full organization and operation. Nor do we know that any one of these plaintiffs is or ever was a director or an official of any kind in this body. How then can it be said that this is a sale by a corporation of its franchise?

These individuals had the right to assign their claim against the company, and the subscription list and books and papers which were all their own property, and also, as individual shareholders, sell all their interest in and control over the assets of the company and the charter of incorporation: this latter part of the transaction would seem to be, as we think it would include, an assignment of all their shares and stock in the capital of the company.

But even if these plaintiffs be the only members of the company, we are not by any means of opinion that any portion of the subject of their sale is of the franchise or rights of the corporation; for this is not a *corporate* sale or transaction, but an individual act of the members of the corporation; and there is a substantial and manifest distinction between a corporate act and an act of the members of the corporation, between the company and the aggregate members of the company; "for the individual members of a corporation are quite as distinct from the metaphysical body called 'the corporation' as any others of her Majesty's subjects are:" *The King v. London* (1 Shower, 278-280); *Bligh v. Brent* (2 Y & C. Exch. 295); *The Society of Practical Knowledge v. Abbott* 2 Beav. 559). There is nothing here which constitutes a transfer of the corporate rights, powers or privileges, which were granted by the legislature to this body, to any other body or persons, although there is a very plain transfer by these isolated members, or it may be of all the aggregate members of the company as represented by these plaintiffs, of all their personal rights and interests.

There appears to be no reason why the plaintiffs should not receive the benefit of the bargain which they made with the defendant.

Judgment for plaintiffs on demurrer.

MCNAB V. STEWART.

Ejectment for the whole—New trial as to half.

The court has power to grant a new trial as to half of a lot of land, allowing the verdict to stand as to the other half, when the granting of such new trial is in the discretion of the court; and this is an action of ejectment. When the new trial is ordered *ex debito justitiæ* the whole record

is thrown open ; and this will be done in ejectment, unless the defendant consents to a verdict standing for such portion of the land as the plaintiff has failed to prove title to. The statute governing the action of ejectment makes it divisible both as to the lands and the parties claiming them.

This was an action of ejectment to recover possession of lot number thirty-six in the fifth concession of the township of Osgoode, in the county of Carleton. The plaintiff claimed title to the land in question, firstly, under a conveyance from the patentee of the Crown ; and secondly, as to the east half of the lot, under one John McNab, who was the heir-at-law of one Colin McNab.

The defendant appeared and defended for the whole lot, and, beside denying the plaintiff's title, claimed title in himself by length of possession of himself and of those under whom he claimed.

The cause was tried before the Chief Justice of this court at the last Ottawa assizes, when a verdict was rendered in favor of the defendant.

From the evidence it appeared that John McDonald was the grantee of the Crown of the whole lot. The patent was dated the 11th of January, 1832, but was not registered in the Provincial Registry Office until the 21st of January, 1862. John McNab and his wife conveyed the land to the plaintiff by deed, dated 24th January, 1863, to the plaintiff, who claimed it as the heir of Colin McNab. Angus McDonald said that he had always heard of his father, the patentee, having left twelve or fifteen years before he gave the quit claim to the plaintiff ; that he had sold the land to Colin McNab, but that he had never signed the deed to him, and he wondered why Colin did not come for his deed.

Peter McLaren said, that he first heard of this land belonging to Colin McNab in 1833 : in the fall of 1839 or 1840 he (Peter McLaren) built a shanty on the lot : he bought all the elm timber on it from Peter McNab, a brother of Colin : he cut the last timber on it in 1842, and no one was then on it : James McNab occupied it less or more, claiming one of these lots.

John Stewart had been living on the west one hundred acres for seventeen or eighteen years, clearing and making improvements.

Donald Cambell said, that Alexander McNab had several children : John, the oldest ; Colin, the second, &c, Plaintiff was the eldest son of John, ; he was, therefore, nephew of Colin, who died in February or March, 1834, never having been married ; the defendant's wife was a daughter of Colin McNab. The defendant was the person he knew settled on the lot. McLaren was the first person who went on it : James McNab after McLaren left it, and before Stewart came to it, lived in the shanty which McLaren had built, calling the lot the Don : James chopped a small piece : he was partly paralysed : he lived with his father and brothers back and forth : he was not continuously there : the east half was a wild lot.

Duncan Ferguson said, that he had understood that John and Peter McNab had put the defendant in possession of the west half : his wife claimed it, as Colin's daughter, and the understanding was it was hers. His improvements were on the west half the greatest part : the east half was chiefly under-brush, except six or seven acres ; it had been cleared two or three years ago. James made improvements on thirty-five, but lived in the shanty on thirty-six : the improvement of about three-fourths of an acre on thirty-six was made by McLaren : James was rather helpless : he was looked after by the rest of the family : he understood Stewart had the west half, and Mrs. McEwans the east half : it was understood in 1836 that Stewart owned the whole lot before either of them took possession : neither Mrs. McEwan nor her husband ever lived on the lot.

At the close of the plaintiff's case the learned Chief Justice over-ruled several objections which were taken by the defendant's counsel ; but he reserved leave to him to move on the fourth objection in the event of a verdict being rendered against the defendant. The jury did not, however, find against him, and the objection was not relied upon in answer to the rule for a new trial.

Peter McNab, who was a brother of Colin, was called for the defence. He said that on Colin's death it was supposed his father was Colin's heir-at-law ; he claimed the whole lot : he paid the taxes : looked after it, sold the lumber on it,

and exercised acts of ownership generally over it as his own ; and that his father made a conveyance to the defendant's wife of the west half of the lot, upon which they took the possession : this was about 1846.

John, the brother of Colin, said, he knew that his father was taking the timber off the land, and was claiming it as his own ; he made no objection at that time, nor before 1850 : the whole lot was then worth £700 or £800 : Colin intended this lot for his daughter; the defendant's wife : John went with the witness to the land to help to build a shanty for the defendant, and the deed was given to the defendant by the father of the witness on the advice of witness and his brother John : after 1850 the defendant agreed to purchase the west half from John rather than have any trouble about it : did not know that Stewart ever took possession of the east half : understood plaintiff got possession of the east half : understood plaintiff got possession of the east half from McEwan.

The direction to the jury was to find whether after Colin's death there had been a possession of twenty years by his father and by others claiming under him, particularly by the defendant as to the west half, so as to bar the claim of the plaintiff as heir-at-law of his uncle Colin, assuming that the legal estate was really vested in Colin in his lifetime ; but as the parties had not raised this question, or were, perhaps, satisfied that Colin had really got a deed from the patentee, although there was some doubt about it, the case was submitted to the jury as if Colin had had the legal estate in fee settled in him in his lifetime.

The jury as before stated found a verdict for the defendant for the whole lot.

Robert A. Harrison obtained a rule *nisi*, last Michaelmas term, upon the defendant to show cause why the verdict should not be set aside, so far as related to the east half of the lot sought to be recovered, and why a new trial as to that part should not be granted, upon the ground that the verdict as to such half was contrary to law, evidence, and the weight of evidence ; for that there was no evidence or no sufficient evidence of possession by the defendant to entitle him to a verdict for that half of the lot by length of posses-

sion ; or why the whole verdict should not be set aside with a view to the recovery of the east half upon the grounds aforesaid, with liberty to the plaintiff to amend the writ of ejectment and all subsequent proceedings by restricting the same to the claim for the east half of the said lot.

C. S. Patterson shewed cause, and cited *Anderson v. Todd*, 3 U. C. Q. B. 16; *McKechnie v. McKeyes*, 10 U. C. Q. B. 37; *Higby v. Cummings*, 10 U. C. Q. B. 222; *Davis v. Lennon*, 8 U. C. Q. B. 599; *Ward v. Murphy*, 11 U. C. Q. B. 445.

R. H. Harrison, contra.—The verdict as to the east half of the lot is against the evidence and the judge's charge; and the ejectment act shews the verdict is divisible: *Terrier v. Moodie*, 12 U. C. Q. B. 379; *Hemmingway v. Hemmingway*, 11 U. C. Q. B. 317; *Doe dem. Shelden v. Ramsay*, 7 U. C. Q. B. 446; *Doe dem. Hall v. Shannon*, 8 U. C. Q. B. 528; *Doe dem. Errington v. Errington*, 11 Dowl. 602; *Doe dem. Smith v. Webber*, 2 A. & E. 448; Con. Stats. U. C. ch. 27, secs. 2, 12, 15, 16, 21.

A. WILSON, J., delivered the judgment of the court.

In granting new trials, when there are several issues, the rule seems to be, that if the new trial be ordered *ex debito justitiæ*, the whole record is thrown open; but if it is by the discretion of the court, it may be upon one issue only: Arch. Pr. 11 Ed. 1517; *The Earl of Macclesfield v. Beadley* (7 M. & W. 570). So it has been allowed in our own court in the case of *Ward v. Murphy*, cited in the argument, at the instance of and to one defendant.

We think the whole provisions of the Ejectment Act show that the action is divisible in its nature both as to the lands and as to the persons claiming the lands; for "the question at the trial shall be, whether the statement in the writ of the title of the claimants is true or false; and if true, then which of the claimants is entitled, and whether *to the whole or part*; and if to part, then *to which part* of the property in question; and again, upon a finding for the defendants, or *any of them*, judgment may be signed and execution issued for costs against the claimants," &c.; and it is in this respect in

accordance with the later decisions : *Doe dem. Bowman v. Lewis* (13 M. & W. 241) ; *Reynolds v. Harris* (3 C. B. N. S. 267) ; *Traherne v. Gardner* (8 E. & Bl. 161).

We see no difficulty, therefore, in granting a new trial to the plaintiff as to the east half of the lot, permitting the verdict to stand for the defendant for the west half of the lot, if it be proper to interfere on his behalf upon the evidence.

The plaintiff's title appears to be of this nature. His paternal uncle, Colin McNab, who died in February or March, 1834, had, in his lifetime, obtained either a deed or a bond for a deed from John McDonald, the patentee of the whole lot. John, the brother and heir-at-law of Colin, who died intestate, and the father of the plaintiff, made a deed of the land to his son, the plaintiff, on the 9th of July, 1862, and the patentee, on the 24th of January, 1863, gave a quit claim of the land to the plaintiff ; so that the plaintiff had the legal title in him under the deed of the patentee, if no conveyance had ever been actually executed by the patentee to Colin, and he had the legal estate in him by virtue of his father's deed, if the patentee had before conveyed to Colin.

The defendant's title, so far as it can be gathered from the evidence, appears to be derived from a deed of the west half of the lot, made to him about the year 1846 by Alexander McNab, the father of Colin, and who at that time was supposed to be the person who was entitled to succeed as the heir-at-law of Colin in preference to the brothers and sisters, and possession accompanying this deed from the time when it was made : the reason of the conveyance being made to the defendant was that he had married the daughter of Colin, for whom the family were desirous of providing.

There is no evidence that the defendant ever really claimed or occupied more than this west half ; but a good deal of evidence was given of a possession of more than twenty years against the plaintiff, before the commencement of this suit. It was stated that Alexander, the father of Colin, believed himself to be, and that all the family also for many years after Colin's death believed he was, the heir-at-law of

Colin; that under this belief he looked after the land from the time of his son's death in the early part of 1834, paid the taxes upon it, and in 1839 sold the elm timber off it to one Peter McLaren, who continued to work upon it till about 1842, to the knowledge of Colin's heir-at-law John, and probably also of the plaintiff, the son of John; that he still continued to look after and to deal with the land as his own, and in 1846 he made the conveyance before mentioned, of the west half, to the defendant. It appears, also, that this plaintiff, or his father, still acting, we presume, under the same belief that it was Colin's father's property, helped to build a shanty for the defendant on the west half of the lot.

There is evidence, however, that about 1850 John, the heir-at-law and brother of Colin, set up his claim as heir-at-law, and that Stewart then agreed to buy the west half from him rather than have any trouble about it, and that the plaintiff got the possession of the east half of the lot about the same time too. The east half is still uncleared and unfit for cultivation, excepting about six or seven acres which were cleared two or three years ago.

We cannot see any claim which the defendant has to the east half of the lot; nor does it appear that there has been twenty years length of possession against the legal claimant.

We think, therefore, there should be a new trial granted to the plaintiff as to the east half of the lot, if the defendant consent to it, and that the defendant should have judgment for the west half, including such costs of the trial as related to the portion, as to which he has succeeded, and also the costs of this application. But if the defendant do not consent to this distribution of the verdict before the 10th of April, the whole verdict will be set aside on payment of costs by the plaintiff, and he may take such steps as he may be advised for confining his case to such part of the lot as he may think he can rightly maintain his action for.

Rule absolute accordingly

BUCHANAN ET AL. V. FRANK.

Sheriff—Poundage.

Held, that under Con. Stats. U. C. ch. 22, sec 271, a sheriff is not entitled to poundage unless he *actually levies the money* due under the writ in his hands; notwithstanding that in consequence of the pressure exerted by seizure of his property the defendant has paid or otherwise settled the debt.

T. Ferguson obtained a rule *nisi* on behalf of the sheriff of Middlesex calling on the plaintiff to shew cause why the order made by the Chief Justice of this court on the 7th of February of the present year, whereby it was ordered that the said sheriff should be allowed all poundage claimed by him for proceeding on the writ of *fieri facias* in this cause, should not be rescinded, on the ground that the sheriff is by law entitled, under the circumstances, to the said poundage, or to some part thereof, and to tax the same against the plaintiff, and on grounds disclosed in affidavits and papers filed.

The affidavits referred to shewed, that the sheriff received an execution against the defendant's goods to levy for debt, interest, and costs, \$3,465 60; that the sheriff seized of the defendant's goods sufficient to satisfy the amount of the execution; that after such seizure, and without any sale by the sheriff, and without any money having been paid to the sheriff by the defendant or made by the sheriff, the plaintiffs and defendant arranged the claim between themselves; that the sheriff was requested to render a bill of his fees, which he did, making the total \$103 64, of which the poundage constituted \$96 64; that the bill was taxed and the poundage was allowed to the sheriff: that the agreement made with the plaintiffs by the defendant was brought about by the pressure of the seizure which the sheriff had made upon the goods so taken.

Downey shewed cause.—This whole question must be determined by the construction to be placed upon the Con. Stats. U. C. ch. 22 ss. 270, 271. The following cases shew that the sheriff, in such a case as this, is not by that statute entitled to poundage, but only to such remuneration in the stead of poundage, as shall be specially awarded to him: *Winters v. The Kingston Permanent Building Society*, Chy. Chamb. Rep. 276; *Gillespie v. Shaw*, 10 U. C. L. J. 100.

Robert A. Harrison with him *Ferguson*, supported the rule.

The statute should not be so rigidly construed as it has been; the sheriff should receive his poundage after a levy has been made; and, if necessary, section 271 should be read as applicable only to cases where there are different writs of execution in the hands of different sheriffs, which would be giving effect to the previous law when it is clear no change was intended by the consolidation, and would harmonize the two sections of the statute.

Alchin v. Wells, 5 T. R., 470; *Chapman v. Bowlby*, 8 M. & W., 249; *Morris et al. v. Boulton*, 2 Chamb. Rep. U.C., 60; *Thomas v. Cotton*, 12 U. C. Q. B., 148; *Brown v. Johnston*, 5 U. C. L. J., 17; *Walker v. Fairfield*, 8 U. C. C. P. 75; *Miles v. Harris*, 31 L. J. C. P., 361, S. C., 12 C. B. N. S., 550; *Colls v. Coates*, 11 A. & E., 826; *Corbett v. McKenzie*, 6 U. C. Q. B., 605; *Gates v. Crookes*, 3 O. S., 286; *Leeming v. Hagerman*, 5 O. S., 38; *Watson on Sheriff*, 2nd edn. 110; 9 Vic. ch. 56, secs. 2, 3, Con. Stats. U. C. ch. 2.

A. WILSON, J., delivered the judgment of the court.

As the sheriff is not an officer who at the common law is entitled to recover any fees as remuneration for his services, his sole claim to them being based on positive enactment, we must see whether he has clearly made out his right to the amount he demands, for the burden of establishing them is upon him, before we can rescind the present order which disallows this poundage.

The whole legislative provision is contained in the two sections of the C. L. P. A., ch. 22, secs. 270 and 271. Sec. 270 provides that,

“Upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage, fees, expenses of execution, and interest upon the amount so recovered from the time of entering the judgment.”

Sec. 271 provides that,

“In case a part only be levied on any execution against goods and chattels, the sheriff shall be entitled to poundage only on the amount so levied, whatever be the sum endorsed

on the writ, and in case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued or any judge thereof in vacation may allow him a reasonable charge for any service rendered in respect thereof in case no special fee be assigned in any table of costs."

Since the case of *Alchin v. Wells* it has been settled that after a levy has been made by the sheriff he is entitled to the poundage, although no sale is made and further proceedings are stayed, in consequence of a compromise between the parties. The decision was made upon the 29 Eliz. c. 4, which provides that the sheriff shall receive his poundage "on the sum he shall levy, extend *and* deliver in execution;" and this "levy," as it is said by counsel in *Holmes v. Sparkes* (12 C. B.), may be either actual or constructive;" for the money is considered to have been levied by "the sheriff when he enters upon the possession of the goods, and by the compulsion of the levy the defendant has been compelled to pay the debt:" *Chapman v. Bowlby* (8 M. & W. 249). Until a seizure has been made the sheriff is not entitled to poundage; therefore, when the debt is paid to him without a seizure he cannot claim poundage: in such a case there has been no levy made—*Graham v. Grill* (2 M. & S. 296); *Colls v. Coates* (11 A. & E. 826)—either actual or constructive.

A seizure, however, is not properly a levy: it does not become a levy until the goods seized have been turned into money: *Miles v. Harris* (12 C. B. N. S. 558); *Drewe v. Lainson* (11 A. & E. 529).

But this money, as before mentioned, need not be made by a sale of the debtor's goods by the sheriff: he may so make the money, but he need not actually do so: if he bring about a payment or settlement of the debt by reason of the compulsion of his seizure, *he* is held under the statute of Elizabeth to have *levied* the money; and if a statute make

no difference between an actual and constructive levying of the money, he will still be entitled to his poundage in that case ; but if it do make such a difference, we must of course give effect to the provision, however hard it may bear against the officer, who has practically done all or nearly all the duty, and incurred all or nearly all the responsibility to have earned his compensation.

Now our statute, after providing generally for poundage in every case in section 270, provides that in cases where a part only of the deed has been levied, the sheriff shall be entitled to his poundage on the amount so levied ; which was a needless enactment, as this has always been the law ; and then it provides, as before stated, that “ in case the real or personal estate of the defendant be *seized* or advertised on an execution, *but not sold* by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be *actually* levied on such execution, the sheriff *shall not receive poundage, &c.*”

Now this enactment does in our opinion establish a distinction, which before that time did not exist, between an actual and a constructive levy, and makes a special provision for those cases in which a mere seizure is made, but which are not followed by a sale, and where no money is actually levied. When the money is actually levied the sheriff may levy his poundage : when the money is not actually levied the sheriff cannot levy or demand any poundage, although he may have seized, but he shall “ receive fees only for the services actually rendered.”

In the present case the sheriff seized, but he did not sell ; nor did he actually levy any money : we have only, therefore, to declare that he is directly within the special provision we have just referred to, and, in the language of the act, that he “ shall not receive poundage.”

It is of no practical value to follow this further, and to say that the present reading of the law has probably arisen from an unintentional oversight in the work of consolidating, for we must accept of the law as it stands. If it were not an intentional alteration, the legislation will no doubt, if it be thought to be expedient, amend the law.

Most of the decisions in our own courts to which we were referred were made upon the law as it stood before the consolidation, and are therefore inapplicable, as are also all of the English authorities. The other cases to which we were referred, and which have been decided since the consolidation, and when the attention of the court was called to the change which had been made in the law, have ended in the same manner as the present one, adversely to the sheriff; and therefore the rule will be discharged with costs.

Rule discharged with costs.

SCOTT v. REIKIE.

*Bond by vendor to convey on a day certain—By whom deed to be tendered—
Damages on default—New trial.*

Where the obligor of a bond binds himself to convey lands on or before a certain day, the bond providing for no act to be done by the obligee as a condition precedent to his receiving the deed, he can only discharge himself from liability by preparing and executing a deed to the obligee, and the latter need not tender the deed for execution. The obligor making such a bond with the knowledge that he has no title to the land is liable for damages to such reasonable amount within the penalty, as the obligee of the bond can shew he is entitled to. In this case, however, as the damages awarded to the plaintiff appeared to be excessive, and the defendant was willing and then in a position to make a deed to the plaintiff, who had so far not suffered from want of it, and the delay had not been wholly the fault of the defendant himself, a new trial was granted to the defendant on payment of costs. *Sikes v. Wyld*, 1 Best & Smith, 587, commented upon. If there be a series of decisions in the courts of this country leading one way, they should be followed in preference to a single decision of an English court, especially where in it there was a difference of opinion among the judges.

The declaration in this case was on a bond in a penalty of \$1,200, to be paid to the plaintiff, his attorney, executors, &c., whereby after reciting that whereas plaintiff had contracted with defendant for the absolute purchase in fee simple, free from incumbrances, of twenty-five acres, more or less, of lot number nineteen, in the seventh concession of Kincardine, commencing at a post planted at the south-east corner of the lot, thence westerly thirty rods to a post, thence northerly one hundred and thirty-three rods and five and a half feet, thence easterly thirty rods, thence southerly one hundred and thirty five rods and five and a half feet to the place of beginning; and whereby after reciting that the

plaintiff had paid therefor \$312, the condition of the bond was declared to be that if defendant should, by good and sufficient deeds in law, convey and assure to plaintiff in fee simple the premises above described, free from incumbrance, with a bar of dower if necessary, on or before the first day of June, 1864, then the bond should be void. Breach: that defendant had not conveyed, or caused to be conveyed, the said premises to plaintiff, but had and did neglect and refuse so to do, and plaintiff claimed \$1,200.

Defendant denied the breach of the bond alleged in the declaration, and said he was not guilty of the same.

The cause was taken down to trial at the last fall assizes for the counties of Huron and Bruce, held before Mr. Justice Hagarty. The bond was admitted, and it was proven that on an application by plaintiff to defendant for a deed, defendant said he had paid for his deed, and would send it over to plaintiff as soon as the government sent the patent to him that he had sent the money for the patent but could not get it. The lot was said to be Crown land, and the delay in getting out the patent was with the government. The plaintiff had been five or six years in undisturbed possession of the premises. One Hamblin valued the place and estimated its value at \$867: he thought the place would rent for \$2 per acre: there were twenty-two acres cleared out of twenty-five. Philip Wainbright valued the place at \$700, and John Stewart at \$835.

For the defence, *R. A. Harrison* objected that there was no tender of a deed to defendant; that plaintiff could in no case recover beyond the purchase money and interest; and that there was no proof of damage. It was agreed that the jury should find the value of the land, for which a verdict was to be taken, with leave to the defendant to move to enter a nonsuit generally, or to reduce the verdict to nominal damages, if the court on this evidence should think plaintiff could not recover at all, or could only recover one shilling, or to reduce the verdict to the amount of the purchase money and the interest, which was \$336 96.

The jury found for plaintiff, and assessed damages on the breach at eight hundred dollars.

In Michaelmas Term last, *Harrison* obtained a rule *nisi* to set aside a verdict and enter a nonsuit pursuant to leave reserved, upon the ground that it did not appear that plaintiff had at any time before action brought tendered to defendant for execution a good and sufficient deed or conveyance of the land mentioned and described in the condition of the bond sued on in this action; or to shew cause why the judgment on said verdict should not be arrested, on the ground that it was not averred in the declaration that any such deed or conveyance was before action tendered to defendant for execution; or why the verdict for the plaintiff, pursuant to leave reserved, should not be reduced to the sum of one shilling, upon the ground that the plaintiff at the trial failed to prove any damages whatever on the breaches assigned in his declaration; or why the said verdict should not, under any circumstances, be reduced to the sum of \$336 96, being the amount of purchase money and interest of said land, upon the ground that the plaintiff, upon the facts proved at the trial, was not in law entitled to any greater or other verdict as the measure of his damages or on the ground that the damages were excessive, and on grounds of surprise, merits, and grounds disclosed in affidavits and paper filed.

The affidavit of the defendant filed on the notion stated, that he was advised and believed that the plaintiff was not entitled to recover substantial damages in the action, and that he was taken completely by surprise by the evidence adduced by the plaintiff on the trial, as to the value of the land in question; that if he had known that the question of value would be contested at the trial, he would have been prepared with evidence to prove the value of the land, which was not more than \$400; that if allowed a new trial he could prove by six witnesses, whom he named, that the value of the land was not more than \$400.

He also filed the affidavit of Harvey Wilson, Murdock Mathieson, Murdock Hunter, John Sheir, Joseph Sheir, and Charles Trows, (the six persons named in his own affidavit,) who severally, and each for himself, made oath and said, that they were acquainted with the quarter lot in question,

having all lived in the immediate neighborhood of it for several years, and having passed over and examined the same frequently; that the said land, describing it, was not worth more than \$400; and that they all owned farms in the immediate neighborhood of the said land.

The rule was enlarged until Hilary Term last, when *C. Robinson, Q. C.*, shewed cause.—As to the first point, the plaintiff was not bound to tender a deed: no money was to be paid by plaintiff—nothing to be done by him as a condition precedent to receiving the deed: the full amount of the purchase money was admitted to have been received; and the rule of law is, that where the vendor binds himself to convey or to make good a title on a certain day, then he must at his peril prepare and execute the deed, for he cannot otherwise fulfil his undertaking to convey or make a title: *Mouck v. Stewart*, 4 U. C. Q. B. 203; *McDonald v. Snitsinger*, 5 U. C. Q. B. 312; *Rogers v. Lake*, 9 U. C. 264; *Smith v. Doane*, 15 U. C. Q. B. 634; *Burns v. Boyd*, 19 U. C. Q. B. 547; *Prindle v. McCan*, 4 U. C. Q. B. 228; *Thayer v. Street*, 11 U. C. C. P. 243.

As to damages, no doubt the general rule is, that in an action on a covenant for seisin or for quiet enjoyment contained in a deed, the measure of damage on an eviction is the purchase money and the interest; but when a person not owning land, and knowing he is not the owner, chooses to bind himself under a penalty to convey or procure a conveyance by a certain day, he is liable to the full measure of damages for the breach of his contract: *Plumer et al. v. Simonton*, 16 U. C. Q. B. 220; *Hopkins v. Grazebrook*, 6 B. & C. 31; *Pounsett v. Fuller*, 17 C. B. 660; *Vallier v. Walsh*, 6 U. C. C. P. 459. As to the excessive damages, he filed the affidavit of plaintiff shewing the state of the land when he went upon it; that he had cleared 19 acres; built a house with additions to it, stables, sheds, &c., and had drained some five acres; that he had made a garden, planted fruit trees, &c., and had expended in clearing, fencing, making improvements, &c., about \$550, besides paying \$312 for the land in February, 1858.

He also filed the affidavit of Alex. Waybrand, who stated he knew the place before and since it was purchased by plaintiff, and who estimated its value at about \$850.

George MacKay swore that he had resided in the neighborhood about eight years: he knew the place when plaintiff went to reside there and since, and he believed it worth \$800. Robert S. Thompson, who resided on the place before defendant went there, and knew it well, also knew the improvements made by plaintiff, and described them. He also knew the value of the land well in that neighborhood, being a bailiff of the division court, and he considered the premises well worth \$700.

These affidavits give the data on which the parties making them formed their estimates, shewing the number of acres cleared, how the land was improved as to farms, ditches, &c., and what houses were placed on the premises; and, therefore, these statements are entitled to more weight than those made in the affidavit filed by defendant, in which the deponents all join in making the same affidavit, in the same words, without in any way giving an account of the manner in which the place has been improved, or on what they base the estimate of its value.

Harrison, contra.—As to the necessity for tendering the deed before bringing the action, *Pool v. Hill*, 6 M. & W. 835, shews that as a general rule it is the duty of the purchaser to prepare and tender the deed, but under the peculiar wording of this bond the authorities referred to seem to be in favor of the plaintiff. On the question of damages the general doctrine is, that, in relation to sales of real estate, if the seller is not able to complete the contract, the buyer can only recover back the purchase money and interest, and, perhaps, damages for investigating the title, unless the seller has been guilty of some misconduct and has not acted *bona fide*. Here it is not pretended that at the time the bond was given the plaintiff was not aware that defendant had no title: there was no fraud or concealment on his part, and, therefore, all that plaintiff can properly claim is the purchase money and the interest. *Sikes v. Wyld*, 1 Best & Smith 587, is the latest case on the sub-

ject, and shews that if the defendant acted *bona fide*, plaintiff cannot recover more than the money paid and interest.

As to the affidavits, those filed by defendant, six in number, all agree that the premises are only worth \$400, whilst those for the plaintiff, only three besides the owner, do not agree in value, one Robert S. Thompson making it \$700, another, Alex. Waybrand, \$850, and the third, George MacKay, \$800, the plaintiff himself saying at least \$800.

RICHARDS, C. J., delivered the judgment of the court.

The cases referred to by Mr. Robinson are express authorities that on an instrument framed such as the one declared on is, before a defendant can discharge himself from the liability created under it he must, according to its terms, "by a good and sufficient deed of conveyance in fee simple convey and assure, or cause to be conveyed and assured, unto the plaintiff the premises therein described." Having failed to do so by the time named in the bond, plaintiff's right of action is complete. As to the damages *Plumer v. Simonton*, and *Vallier v. Walsh*, are express authorities in our own courts that defendant, under a bond like this, executed when he knew he was not the owner of the land, in case of default, is liable for more than nominal damages, and for more than the purchase money and the interest. The contract becomes in fact like an ordinary one, and the defendant is subject to such reasonable damages as the plaintiff can show, up to the amount of the penalty of the bond, he has sustained in consequence of the breach of the contract. The judgment of the late Mr. Justice Burns in *Plumer v. Simonton*, puts the law on an intelligible footing, and it seems to me, as far as our courts are concerned in this country, ought to be adhered to. If *Sikes v. Wyld* does in effect lay down doctrines differing from *Hopkins v. Grazebrook*, *Robinson v. Harman*, and the cases in our own court, I think we should follow the decisions in our own courts, until these doctrines are more fully settled in England. The judgment in *Sikes v. Wyld* was concurred in by Blackburn and Wightman, J.J., and Cockburn, C.J., dissented on the express ground that the defendants were liable because they knew they had neither the legal nor equitable estate in the

land at the time they contracted to sell it to the plaintiff. If that case was not distinguishable from the case in our own court, (and I think it is distinguishable) I am clearly of opinion we ought not in this court to follow it until the questions there raised are settled in a more satisfactory manner by a court of appeals either in England or in this country.

As to a new trial on the affidavits, the jury seem to have given the plaintiff more than the full value of the premises, according to the estimate of one of the witnesses called by him on trial, and according to the estimate of Thompson, whose affidavit he files, whose estimate is \$700: "well worth \$700" are the words. The defendant does not seem to have been practising any fraud, or to have acted designedly with a view to injure plaintiff or to deprive him of the title to his property. He seems to have sent forward his money to obtain the patent, but owing to some delay in the Crown Lands department it was not forwarded to him in time to enable him to perform the condition of the bond; so that if the plaintiff insists now in pursuing this action against the defendant, who, it is stated, is ready and willing to give him a deed, he ought not to get more than an indemnity for the value of the property, not a fictitious or fanciful price for it. As the plaintiff up to the present time has not apparently been injured by the delay, and does not seem inclined to have a title made to him for the land in dispute, it would only seem reasonable, when two of the four or five persons who speak of the value of the property, estimate its value at \$100 less than the jury have found, that the defendant should have an opportunity to call some witnesses to speak of its value. It is true the reason he gives for not calling witnesses as to the value at the trial is not very satisfactory, yet he seems to have suffered from not having the proper view taken of his case, and we think we will be doing no injustice in allowing him to submit the evidence of the six persons who estimate the premises at only \$400 in value, to the consideration of a jury. Under all the circumstances, however, we can only grant the new trial on payment of costs.

Rule absolute for new trial on payment of costs.

THE GREAT WESTERN RAILWAY COMPANY V. BAIN.

Mortgage—Intention as to subject matter of—Trade fixtures.

B. mortgaged to the plaintiffs certain premises, *together with the water wheel and flumes*, outhouses, buildings, ways, waters, water courses, privileges and appurtenances to the said premises belonging; and afterwards mortgaged to H. the same premises, describing them as the *woolen works, and also all the fire engine, boiler, machinery and fixtures, and the water wheel, and all fixed machinery, and shafting and fixing of every kind* about the same. Subsequently to these mortgages B. conveyed to M. his equity of redemption in the said premises, also describing them as the Dundas Woolen Works, * * * *together with all the machinery in and about the same then owned by G. B.* H. assigned his mortgage to K. B. Subsequently to the mortgage to the plaintiffs, B. & M. placed on the premises certain looms, spinning machines, warping mills, and various other articles of the same kind, which were secured by nails and screws to the floors, and by braces secured by screws and bolts to the ceilings, but could be easily removed without injury either to the premises or to themselves. B. having made default in certain payments due under his mortgage, a decree of foreclosure was obtained in the ordinary course from the Court of Chancery against M., in whom the equitable title was vested by conveyance from B., and a day was appointed for him to redeem or be foreclosed. In the meantime, however, M. & K. B. sold the machinery last mentioned to the defendant, who removed it from the premises. In an action by the plaintiffs against the defendant for the conversion of the machinery in question, and on a motion to set aside the verdict obtained by the defendant, Held, that the terms of the mortgage to the plaintiffs did not indicate an intention that the plaintiffs should have a claim upon any portion of the machinery in the premises except that only which related to the motive power of the mill.

Seemle, that the mortgage to H. conveyed the machinery in question in the suit; that had the machinery at the time of the conveyance by B. to M. been the property of B. as chattels, it would without doubt have passed to M.; and though the machinery might for many purposes have been looked upon as fixtures, yet as between the plaintiffs as mortgagees and B., and all persons claiming under him, it was not so annexed to the freehold as to be irremovable by the latter.

Quere, as to the general right of a mortgagor to remove from the mortgaged premises machinery of the kind annexed in such a way to the freehold.

General review of the authorities both in England and this country on the subject of fixtures, since *Carscallen v. Moodie*, 15 U. C. Q. B. 304.

The declaration charged that defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of, to wit, one Stafford loom and furniture, one Crompton loom and furniture, one Broad loom and furniture, one organ spinning jack and forty spools, one warping mill and thirty spools, one spooling machine for warping mill, eight thousand bobbins, one sett of manufacturing cards, with card, clothing and belting, and one hundred side spools, one grinding machine and emery cylinder, two emery cylinders, one spooling machine, four sett of manufacturing cards, four large spools and two spool frames, four set of manufacturing cards, one burring machine for manufacturing cards,

and one broad gig and slots, and the plaintiffs claimed two thousand five hundred dollars.

The defendant pleaded that the goods were not, nor was any part thereof, the goods of the plaintiffs as alleged.

The cause was taken down to trial at the last fall assizes for the county of Wentworth, before Mr. Justice Adam Wilson. The case for the plaintiff was gone through with before him, and the remainder of the evidence was taken by Miles O'Reilly, Esq., Q.C., the learned judge being obliged to leave Hamilton before the close of the case. The learned Queen's Counsel was present during the whole trial, and at the conclusion of the case charged the jury, and received their verdict which was for the defendant.

The following appeared to be the facts of the case, so far as they are necessary to be considered for the decision of the cause: On the fourth of April, 1855, George Munns Barton mortgaged in fee to the plaintiffs certain premises in the town of Dundas, in the county of Wentworth, which were therein described, and all the right, title, interest, and privileges of Barton in and to the possession and use of the head and power of the stream of water and of the dam, which was constructed on the lands and premises mortgaged, and upon the adjoining lands of Robert Hope, Esquire, together with all rights of way and water conferred on Barton by any deeds, or held and enjoyed by him, or in any way used by him, and all the benefit, advantage, rights and privileges bestowed by any covenant respecting the said land and water privileges from John Paterson or any other person to Barton, *together with all and singular the water wheel and flumes, houses, outhouses, buildings, ways, waters, watercouses, privileges, profits, hereditaments, and appurtenances whatsoever* to the said tract of land, tenements, hereditaments and premises belonging or in anywise appertaining, or therewith used and enjoyed, or known or taken as part or parcel thereof, or as belonging thereto, or to any part thereof, to hold to plaintiffs, their successors and assigns, in fee simple, (with a certain exception not important to be noticed,) subject to a condition that the mortgage should be void on payment to the plaintiffs of £1,500 with interest from the

4th of April, 1856, at six per cent. per annum, in fifteen equal annual instalments with interest on each instalment from 4th April, except the first one or two instalments. It was further provided that until default made in the payment of the money mentioned in the proviso, or of the interest thereof, or in the keeping of some one or more of the stipulations or agreements in the proviso particularly set forth, contrary to the true intent and meaning of the proviso, it should be lawful for Barton to occupy the lands and premises with the appurtenances, and to take the rents, issues, and profits thereof. There was also a covenant by Barton for quiet enjoyment by plaintiffs after default in paying the money mentioned in the proviso, or the interest thereof, or any part thereof, or in the keeping of the covenants or stipulations in the covenant contained, and that plaintiffs might in case of like default enter upon the lands and premises.

On 24th December, 1855, Barton by another mortgage in fee mortgaged the premises to Robert Hunter, of the city of New York, physician, in consideration of £1,500, describing them as "all that tract of land and premises situated and being in the town of Dundas, in the county of Wentworth, with the water privileges and rights of way purchased by Barton from John Paterson, and being composed of two acres of land more or less" (part of lot number fifty-two, &c.,) "*and which said lands and premises are known as the Dundas Woollen Works, with all the lands, flumes, buildings, rights of way and other appurtenances now used or belonging thereto, and also all the fire engine, boiler, and machinery and fixtures, and the water wheel, and all fixed machinery and shafting, and fixtures of every kind about the same, and every right of water and way over the land of Robert Holt, or any other person, now appertaining to the said premises, together with all the tenements, hereditaments, and appurtenances thereto in anywise belonging, to hold to Hunter in fee, subject to a proviso that the indenture shall be void on payment by Barton of £1500.*"

On the 19th of February, 1861, Barton, pursuant to the statute for facilitating the conveyance of real property, in

consideration of £3,600, conveyed to Blankenburg McNab, of Dundas, woolen manufacturer, in fee, the premises conveyed to plaintiffs and described in the same way, but instead of providing "together with all and singular the water wheel and flumes, &c.," the deed to McNab stated, "the said property being all that property known as the Dundas Woolen Works, with the residence built by said Barton, and also including the brick house and farm building attached thereto, which was formerly occupied by William Slingsbury, being the whole factory property and premises owned by the said Barton, together with all the machinery in the said Dundas Woolen Works and about the same, then owned by the said Barton." In the covenant against incumbrances was excepted the mortgage to plaintiff, to Robert Hunter, and, on the Kingsley House, to Peter Paterson. The Slingsbury House was excepted out of the mortgage to plaintiffs.

Hunter, on the 18th February, 1862, assigned his mortgage to King Barton, described in the assignment as of the city of New York, Esquire.

George M. Barton paid the first two instalments of principal and interest, and part of the third instalment to plaintiff, amounting to about \$900, and he made improvements; but nothing was paid to plaintiff further than has been mentioned. On the 16th September, 1861, a bill of foreclosure was filed by plaintiffs against Blankenburg MacNab, in which they alleged there was due them on that day, for principal£377 6 8
and for interest 87 18 5

£465 5 1

On the 14th January, 1862, the decree of foreclosure against McNob was made, declaring him foreclosed unless he paid the amount then due in six months after the master's report.

The final proceedings in foreclosure resulted as follows: as to McNab, unless he redeemed by 13th July, 1863, he was foreclosed; as to King Barton and George Munns Barton, they were foreclosed if they did not redeem by 14th July, 1863.

Neither of the parties redeemed. King Barton and McNab sold the machinery in question in this cause on 27th May, 1863, to the defendant for \$1250 in cash (gold), who took it away from the premises.

The machinery, the subject of the action, was put into the premises by George M. Barton and McNab after the mortgage to the plaintiff of 4th April, 1855, and before the 27th May, 1863.

It further appeared that the premises had been purchased by the plaintiffs from Paterson, and conveyed by the latter to Barton at plaintiff's request before the mortgage to them; that before the plaintiff's mortgage, George M. Barton had mortgaged with plaintiff's knowledge certain portions of the machinery by a chattel mortgage to Paterson, which was dated the 4th day of April, 1855: this portion of the machinery was not in dispute in this cause. Possession was taken of the mortgaged premises by plaintiff on 5th December, 1863.

The looms and other articles, the subject of litigation between the parties, were placed in the mortgaged premises, and had been used for the purposes of carrying on the business of a woollen cloth manufactory, and were secured by screws and bolts to the ceilings, but could all be easily removed without injury to the building, and without injury to the articles themselves.

Before the premises were mortgaged to the plaintiffs they had been used as a cloth factory, and after that they had been considerably improved, and the new machinery in question had been introduced; the old machinery also remaining thereon, or a portion of it. The object of using the screws and nails was to fasten the machinery to the floor to keep it steady. Barton also had a steam engine in the premises which was not taken out.

At the close of the plaintiff's case the defendant moved for a non-suit, on the ground that it was not shewn that the machinery was put into the premises with the intention of making it a part of the freehold; that the fastening was not put there for that purpose, but only to steady them to enable

them to be worked; that they were trade articles put in by the mortgagor when he had possession, and taken out by him while he was yet in possession, and sold to a *bond fide* purchaser without notice.

The learned Judge ruled that the jury might be asked what the intention of the party was in getting in the machinery: whether it was for the purpose of making it a party of the freehold, or of enhancing its value, or simply of working the machinery in the way of trade, and of steadying it by temporary fastenings while it was being worked; and then the court should determine whether the kind of fastening did make the articles part of the freehold as against the party who put them in.

For the plaintiffs, *Æ. Irving, Q. C.*, contended that as a matter of fact the party did not put in the machinery to be attached to the freehold, but that was to be inferred as a matter of law from the mere fact of its being introduced by a mortgagor in fee or those representing his rights, which was different from the act of a tenant for years; even if plaintiff could not claim the machinery from a tenant for years, which he contended they could.

For the defendant Mr. Geo. M. Barton was called, who swore that he had purchased the machinery in the factory from Mr. Patterson two or three days after he had bargained with plaintiffs for the land. He stated that he had put in various articles of the machinery in dispute, and he was asked (the question being objected to by plaintiff's counsel), with what intention he put the things in. He stated his intention in putting them in was merely to carry on the business more extensively, not for any purpose of increasing the value of the freehold. There was no intention to attach them to the freehold. He did not direct the nails to be put in, and if there had been any new improvements, if he were carrying on the business, he would have taken these out and put in new ones. He added that he had built a new house on the premises which cost \$2,500, a steam engine and boiler \$2,500, a new water wheel costing eight or nine hundred dollars; in fact, improvements to \$6000 and upwards; and he had paid plaintiffs \$900 in cash. McNab stated he had put in

the machines placed there by him for the purpose of carrying on the manufactory, nothing else. He said he had changed the looms twice, and did not regard them as fixtures: he never intended they should form part of the freehold. He said he was to pay off the mortgages as part of the consideration he was to pay for the place; that Hunter's mortgage had three years to run: he added that he had paid G. M. Barton about \$1000, and given him a mortgage for the balance.

Some other witnesses were called for the defendant, who spoke of the manner in which the looms and machinery were secured to the building, and that they did not consider them as fixtures; that if the building had been leased they would have been secured in the same way.

The learned Queen's counsel in charging the jury directed, that if the machinery had been affixed to the premises with the intention of its remaining there permanently, or becoming part of the freehold, then to find for plaintiffs for the value; but if put there merely for the purpose of carrying on the manufacturing business more conveniently and expeditiously, and that the fastenings were temporary, to enable the operators to use the machinery, and to prevent its moving about inconveniently, then to find for defendant.

The jury found a verdict in favour of the defendant.

In Michaelmas Term last, *Irving, Q. C.*, obtained a rule *nisi* to set aside the verdict and for a new trial without costs, on the grounds, that the verdict was against law and evidence; and also for misdirection in this, that after the evidence was given that the machinery had been annexed to the freehold by the mortgagor in possession, or by the owner of the equity of redemption, such evidence was sufficient to establish the intention with which such machinery was annexed to the freehold, and after such evidence it was wrong to leave it to the jury to determine whether in their opinion such machinery had been annexed with a permanent intention, or merely more substantially or permanently than if put in by a tenant for years; or why a new trial should not be had without costs, on the ground of the reception of improper evidence, in this, that the witnesses, G. M. Barton

and B. McNab, having annexed certain machinery to the freehold, and at the time being owners of the freehold as mortgagors in possession, and owning the equity of redemption, could not be asked by the defendant what was their intention in putting in that machinery, for the question of the intention with which the machinery was annexed by them could only be established by acts done; that such evidence was inadmissible, as these acts as well as the deed put in evidence estopped the defendants from setting up the evidence that the machinery was fixed temporarily, and that such evidence was irrelevant.

The rule was enlarged until Hilary Term last, when *S. B. Freeman, Q. C.*, shewed cause.—The question must necessarily be, whether the parties placing the machinery in the premises intended to annex it to the freehold or not. The fact, which is not denied, that a portion of the machinery then on the premises was assigned to Paterson by G. M. Barton, and held by him under a chattel mortgage, with the knowledge of the plaintiffs before the mortgage to them was executed, and the fact that the mortgage to plaintiffs only covers the machinery then on the premises, the water wheel and flumes, houses, out-houses, &c., shew that G. M. Barton intended to mortgage to them only the working motive machinery of the mill, and not the looms, carding machines, &c.; and that in any affixing of machinery of that character, it could not be held that it was done with intent to permanently attach it to the freehold. *Hare v. Horton*, 5 B. & A. 715, is a strong authority in this view of the case. The machinery included in Paterson's mortgage not passing to the plaintiffs, that of a similar character would not be intended to pass, and the subsequent conveyance of that kind of machinery in the mortgage to Hunter, and in the conveyance of the fee to McNab, clearly shews that it was the understanding of the parties that such machinery was not intended to be affixed to the freehold, so as to pass to the plaintiffs. The machinery put in by McNab was subsequent to the default made in the payment of the mortgage money, and there is no reason to presume that he then intended affixing it to the freehold. The evidence shews

that the mode by which they were fastened to the floors was only such as was necessary for their enjoyment in manufacturing cloth ; and unless it can be presumed from other circumstances, it cannot be fairly urged that when they were placed there so slightly attached, that it was intended by either Barton or McNab, when they placed them there, that they should be and remain affixed to the freehold. The distinction is often pointed out between fixtures put up by tenants for the purpose of trade, and those placed by the owner of the fee for the advantage of the inheritance. These articles were more in the nature of machines used for the immediate profits of the business, than for the making of the freehold property more valuable. The language of Baron Parke, in *Hellawell v. Eastwood*, 6 Ex. 313, is peculiarly applicable to this case. The question was, whether cotton-spinning machines, which were fixed by means of screws, some into the wooden floor, some in lead, which has been poured in a molten state into holes in stones for the purpose of receiving the screws, had lost their character as chattels, so as not to be distrainable by being considered as affixed to the freehold. Baron Parke said, " The only question is, whether the machines, when fixed, were parcel of the freehold ; and this a question of fact depending on the circumstances of each case, and principally on two considerations ; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre salve et commode* or not, without injury to itself or the fabric of the building ; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causa*, or, in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a *chattel*. Now, in considering this case we cannot doubt that the machines never became a part of the freehold : they were attached slightly, so as to be capable of removal without the least injury to the fabric of the building, or to themselves ; and

the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold, any more than a carpet would be, which if attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and others matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probaly the reason why they and similar articles have been held in different cases to be removable. The machines would have passed to the executor (per Lord Lyndhurst, C. B., *Trapps v. Harter*, 2 C. & M. 177): they would not have passed by a conveyance, or demise of the mill. They never ceased to have the character of moveable goods, and were therefore liable to the defendant's distress." This language applies with equal force to the defendant's right to purchase these machines as goods and chattles, and would seem to be conclusive in his favor. *Lancaster v. Eve*, 5 C. B. N. S. 717, is authority to shew that the presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by shewing the intention of the parties to the contrary. The language of the judges, used and quoted in the argument, and in giving judgement in that case, implies that when the thing is so annexed as to be severable without injury to the freehold, the rights in such a case must always be subjected to explanation by evidence; and if a chattel is put up so that the owner can remove it, there is no reason why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appears to have been so agreed. He referred to *Walmsley v. Milne*, 7 C. B. N. S. 135, per Crowder, J., as shewing that the question of annexation was one of intention; to *Cameron v. Oates*, 7 U. C. Q. B. 728, where the annexation was clearly for making the enjoyment of the freehold more valuable; *Fisher v. Dixon*, 12 C. & F. 312, and *Carscallen v. Moodie*, 15 U. C. Q. B. 304, and concluded his argument by urging that none of these cases when properly considered laid down any doctrines that could properly be held as being adverse to the defendant.

Irving, Q. C., contra.—There is an obvious distinction between cases where the machinery is affixed by a tenant for the mere enjoyment or use of it as a chattel, and where it is affixed by the owner of the soil and for the purpose of being used in connection with and as part of the mill or manufactory itself. In the former case to deprive the tenant of his chattel, there must not only be a complete annexation to the freehold, but the tenant must have failed to remove it during the term. A mortgagor in possession can only be considered as the owner of the property for the time being, and whatever he attaches to the freehold must be considered a fixture, particularly when, as in this case, he purchased the premises for the purpose of carrying on a manufactory, and the machines annexed to the freehold were such as were necessary for that business. The subsequent mortgages to Hunter and McNab treat the machinery that had been placed in the premises at their respective dates as passing with the freehold, and when an attempt was made to seize them for taxes the parties in possession claimed that they were annexed to the freehold. Though the parties who placed the machinery in the factory at the time they were put up may not have thought they were affixing them to the freehold, yet such must be the legal effect of what they did; for at the time they were not tenants contemplating the removal of the fixtures during their term, but the owners in fee subject to a mortgage, and having affixed them they cannot now claim that they did not pass with the freehold. *Walmsley v. Milne*, 7 C. B. N. S. 115, is one of the latest reported cases on the subject: the former decisions were fully discussed, and the court in giving their judgment reviewed many of them. In some of the cases reviewed this doctrine is in effect laid down and not dissented from, “that when the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term and part of the freehold, and if the inheritance be afterwards sold or let it goes with the freehold, and there is no distinction for that purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage made by the owner of the inheritance passes all the fixtures thereon without naming them, and no case

goes so far as to determine that when a mortgagor in possession alters the premises by addition or otherwise the mortgagee shall not take the benefit of such alterations, and there is no distinction substantially between those which were affixed before and those which were affixed after the date of the mortgage deed." In addition to the cases cited on the other side he referred to *Bunnell v. Tupper*, 10 U. C. Q. B., 414; *Mather v. Fraser*. 2 K. & J., 536; Taylor on Evidence, sec. 1087.

RICHARDS, C. J., delivered the judgment of the court.

I quite concur in the opinion so frequently expressed, that it is impossible to reconcile all the decisions and *dicta* of the judges on the subject of fixtures. I think the doctrine most in unison with principle and reconcilable with authority is, that whatever is permanently annexed to the freehold forms part of it and cannot be removed, unless it comes within some of the exceptions. If put up by a tenant they may, if in the nature of trade fixtures, and in some cases if only ornamental fixtures, be moved during the term or the period during which he is in possession and holds the premises under a right still to consider himself as tenant. If not so removed they remain part of the freehold and become the property of the landlord. If merely affixing the chattels to the building constitutes them part of the freehold, as the old doctrine certainly was, they ought not to be liable to be distrained for rent, or sold under an execution against the tenant; but the authorities go to the extent of holding that they may be so taken or sold. When these same fixtures are placed on the premises by the landlord and attached to the freehold, in the same way they undoubtedly became part of the freehold, and cannot be seized as goods and chattels. No doubt a landlord may have personal property, and even machinery on premises, that is not attached to the freehold, and this very machinery may be used in connection with the motive power that propels other machinery, that undoubtedly forms part of the freehold. Take the case of the owner of a flouring mill finding at particular seasons of the year he has more power from the work-

ing machinery of the mill than is necessary for his ordinary business. If he were to hire a planing machine and put it in the lower part of the mill where it was only attached by a band to the motive power of the mill, and was kept in its position by its own weight, or was steadied by braces from the flooring of the mill, under these circumstances I doubt not the planing machine would only be a chattel not in any way forming a part of the freehold of the mill. On the other hand, suppose a chest of bolts only connected with the other machinery of the mill by a band to give them motion, but used as a part of the manufacturing machinery of the mill, though steadied in precisely the same manner as the planing machine, I have no doubt this chest of bolts would be part of the freehold of the mill, if put in by the owner of the premises. Suppose the mill when erected had been intended only to be used for the ordinary grinding of grain for home consumption. and the owner had determined to make a superior quality of flour for a foreign market, and it became necessary to obtain another chest of bolts for that purpose ; after he had procured them and placed them in his mill and used them for the purpose of his business as a miller, I think they would become part of the freehold and pass with it, though he might not use them all the time, or, when grinding flour of another description, he might use the bolts, which would give the other kind of flour. The fact that the owner of the soil might from time to time remove these bolts and place others in their stead, when he deemed it desirable to do so, would none the less make them fixtures passing with the freehold. Most of the leading authorities up to that time, bearing on the case before us, were discussed at great length and abstracted in *Carscallen v. Moodie* (15 U. C. Q. B. 304). I have endeavored to collect the cases both in England and this country, bearing on the point, decided since *Carscallen v. Moodie*.

Walmsley v. Milne, 7 C. B. N. S. 115. This case was argued at great length, and most of the authorities were commented upon and reviewed by the court. The facts were, that Moore, a bankrupt, being owner of a vacant lot of ground, in 1853 mortgaged it in fee to one

Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became a bankrupt in September, 1858, and plaintiffs were appointed his assignees. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground, and set up all the articles sought to be recovered in the action. They consisted of a steam engine and boiler, used for the purpose of supplying with sea water the baths which had been erected on the premises, also a hay cutter, and malt mill, or corn crusher, and grinding stones, all (except the grinding stones) being screwed with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or the things themselves. The upper mill stone lay in the usual way upon the lower grinding stone. All these fixtures were put up for the purposes of trade.

Crowder, J., in giving judgment stated, that of the cases referred to in support of the plaintiff's right only two were cases between mortgagee and mortgagor; the first, *Trappes v. Harter* and *Waterfall v. Penistone*. The learned judge distinguished between those cases and the one in which he was giving judgment somewhat as follows: in the first case the mortgage enumerated various fixtures, but did not refer to the fixtures in dispute, and that omission with the other circumstances in the case induce the court to be of opinion that they were intentionally omitted in the mortgage deed and did not pass by it. The other case involved the consideration whether the fixtures were to be deemed goods and chattels within 17 and 18 Vic., and *Hellawell v. Eastwood* was recognized as valid authority; and the mortgage was of a peculiar description. There had been a prior mortgage of the premises with the fixtures then thereon: afterwards for a further consideration a mortgage was made of the fixtures, which had been subsequently annexed by themselves, and the court was of opinion they did not pass by the prior mortgage, "because the tenor of the instrument shows that the parties did not so intend;" and they held the subsequent

mortgage of these fixtures was within the statute requiring the deed to be registered, and for want of such registration the fixtures passed to the assignees ; but in the case before him there did not appear any circumstances tending to show an intention existing between the bankrupt and his mortgagee that the fixtures annexed subsequently to the date of the mortgage should not become part of the mortgaged estate, and in the absence of such intention the current of authorities in the bankruptcy court shows that such an annexation of fixtures would enure to the benefit of the mortgagee. After referring to the cases in equity, to *Mather v. Fraser, Fisher v. Dixon*, and other cases, he concludes his judgment as follows : “ We think, therefore, that when the mortgagor (*who was the real owner of the inheritance*) after the date of the mortgage annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them a part of his freehold, which had been vested by the mortgage deed in the mortgagee, and that consequently the plaintiffs who are assignees of the mortgagee cannot maintain their present action.”

In referring to the doctrine laid down in *Hellawell v. Eastwood*, that the object of the annexation of the machinery was not for the permanent improvement of the inheritance, but merely to steady it and render it more capable of convenient use as a chattle, the learned judge said, that without expressing any opinion on that case it was sufficient to observe it was no authority for holding that the disputed articles in the case before them were not fixtures, for that they were of opinion that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of these premises, subject only to a mortgage, which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler they were necessary for the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it

and to improve its usefulness as a stable. The malt mill and grinding stones were also permanent erections intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell v. Eastwood*.

Haley v. Hammersley, before Lord Chancellor Campbell, 27 April, 1861, reported 4 Law Times, N. S. 269. A mortgage and further charge was made on certain plots of land, and also of all that silk mill then erected or in course of erection, and all other buildings then or thereafter to be erected thereon, and also all those steam engines or steam engine boilers, steam pipes, main shafting, mill gearing, millwright's work and other machinery and fixtures whatsoever there erected or set up, or standing, or being, or which should at any time thereafter be erected, or set up, or stand, or be in or upon the said land, mill and premises, or any part thereof. B, a subsequent mortgagee, contended that the mortgage to A was limited to such machinery as was necessary for the purpose of giving motive power to the mill. All the disputed articles were fixed by iron or other fastenings. *Held*, reversing the decision of the Master of the Rolls, that the mortgage was not so limited, but that the mortgage of A comprised all the machinery and fixtures used in the manufacturing of silk within the mill.

Most of the cases referred to in *Walmsley v. Milne*, as well as that case, were cited on the argument. The Lord Chancellor remarked: "I must begin by observing that this case does not depend upon the general law of fixtures as between heir and executor, or between tenant for life and remainder-man, or between landlord and tenant, and the cases decided between parties standing in any of these relations to each other, without any special contract, can be of very little service to us." He then argues on the words of the mortgage as being of a silk mill, and says: "I do not know that the gearing and all the millwright's work is exclusively applicable for giving power to the mill. At any rate we find added the words, 'and other machinery and fixtures whatsoever erected, or set up, or standing in or

upon the land, mill or premises.' All the disputed articles are admitted to be machinery erected, set up and standing in and upon the mill, and used in it for the manufacture of silk within the mill : they are fixed by iron or other fastenings to the roof, sides or floor of the mill. * * * *

Very many machines, such as a watch or a steam thrashing machine, comprehend the moving power and along with it the machinery employed to accomplish the object for which the machine is constructed. There would be no absurdity in including in the security all the machinery placed in the mill, whether for creating power or being moved by the power created ; on the contrary, it seems rather improbable that the parties should have contemplated such a damaging description of the machinery as must take place, if the mortgagees, in seeking to make good their security, must tear in pieces the machinery in the mill, removing and selling one half of it, which would be of comparatively little value without the other half. Accordingly in the mortgage to the *defendants* it is admitted that the whole of the machinery passes, although to comprehend it, I do not think that the additional words do more than express what is implied by the general words used in the first mortgage to the *defendants*." He then refers to the mode in which the machines are secured to the building and proceeds to observe : "They may be unscrewed and removed, but they are permanently fastened to iron rods, which are part of the roof of the mill and are fixed to the freehold. I likewise think the machines described under No. 18 and so fixed to the roof of the building *might pass as fixtures under this deed*. Between these parties the criterion is not what is affixed to the freehold for the permanent improvement of the freehold, but what is set up in the mill to be used as machinery or fixtures in carrying on the business of manufacturing silk in the mill. Nor are we to consider whether such machines or fixtures are distrainable for rent, or might be taken in execution by the sheriff under a *fi. fa.*, although they are not affixed to the freehold to remain there forever for the permanent enjoyment of the building. They were the property of the mortgagors, who have assigned them to the mortgagees as part

of the security for the £4500 advanced. Of course it is not contended that the mortgagors could afterwards derogate from the grant and give a preferable right to defendants. With respect to authority I content myself with saying that I entirely concur with Wood, V. C., in his general view of the law upon this subject in *Mather v. Fraser*, and that I do not consider it necessary again to go over the decisions, which I commented upon in my judgment in the House of Lords, in *Fisher v. Dixon*."

In *Dumergue v. Rumsey*, (9 Law Times, N. S. 775, S. C. 10 Jur. N. S. 155, in the Exchequer Chamber,) Williams, J., said: "Fixtures until severed are not chattels. A tenant would have a right to remove tenant's fixtures during his term, but they are not goods and chattels: they are as fixtures parcel of the freehold, and as such not recoverable in trover, and there is nothing inconsistent in a tenant during his lease abandoning that right." The court then reviewed the decision of the Court of Exchequer in that case. By a provision in the lease the tenant could remove the fixtures, unless the landlord paid for them after twenty-one days' notice.

In *London and Westminster Loan and Discount Co. v. Drake*, January 16, 1859, (6 C. B. N. S. p. 798,) the nature of the tenant's interest in fixtures is discussed. It was held that when the lessee mortgaged tenant fixtures and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant, the mortgagees had a right to enter and sever the fixtures, it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender.

In *Leader v. Homewood*, (5 C. B. N. S. 546,) it was held, that an outgoing tenant had no right to enter for the purpose of severing and removing fixtures after the expiration of his term and a new tenant had been let into possession. It is put as a query, whether a tenant holding over at sufferance would be entitled to remove fixtures.

In *Carscallen v. Moodie* (Trinity Term, 21 Vic. 1858), the head note is as follows:—"A building used as a store-house was converted into a steam grist-mill. Afterwards

the mill machinery was taken out, the boiler and engine being left to work various other machines, which were put in for the purpose of making sashes and blinds, such as planing machine, turning lathe, &c. These were fastened to the floors and timbers of the building to steady them whilst in motion, each machine being independent, capable of being moved without material injury to the building, or interfering with the engine, and capable of being worked by any other motive power. In the assignment under which plaintiff claimed, these machines were described as chattels; but the deed being void, as to the personalty, for want of registration, he contended they were part of the inheritance, not subject to an execution against goods, and passed to him with the land and building in which they were, which were included in the assignment. *Held*, the machines were chattels, seizable under a *fi. fa.* against goods."

Gooderham v. Denholm (18 U. C. Q. B. 203, 214, Easter Term, 22 Vic. 1860). In this case many articles of machinery used in the business in which the mortgagors were engaged, were held not to pass under the mortgage of the land alone; but these machines were not generally attached to the building by screws or nails, but were kept firm by their own weight, and were prevented from shifting sideways by blocks and by spikes, but they could be lifted off without disturbing anything.

Davy v. Lewis (at page 21 of same volume) was a case where certain trade fixtures had been put in the premises by the tenant, who had the right to remove them. The tenant assigned to one L. both the demised premises and the machinery. L. sold the machinery to the plaintiff. The landlord prevented him taking the machinery away. *Held*, plaintiff was entitled to recover, as the machinery, by the agreement between the landlord and tenant, had been expressly made chattels.

Grant v. Wilson et al. (17 U. C. Q. B. Trinity Term, 22 Vic. 1859) decides, that when the machinery of a mill that has been mortgaged is removed for the purpose of making repairs, it cannot be seized under an execution against the goods and chattels of the mortgagor.

Markle et al. v. Houck et al. (Hilary Term, 23 Vic.): *Held*, that hay scales, erected partly on the plaintiff's land and partly on the street, which could be removed without disturbing the soil, and which were suspended on hooks in posts let into the soil, were not fixtures.

Harris v. Malloch (21 U. C. Q. B. Trinity Term, 25 Vic. 1861) decides, that when a steam engine and other fixtures were put upon the mortgaged premises, and were afterwards removed, they could not be sold for the debt of the mortgagor.

Anderson v. McEwan (9 U. C. C. P. 176, Hilary Term, 22 Vic., 1860.) The effect of this case is to decide, when the owner of land mortgaged it, when a saw-mill was erected on it, the land being in possession of his son, and the mortgage being to purchase machinery to put in the mill, default having been made in the payment of the mortgage, that the machinery whilst attached to the freehold was the property of the mortgagees, and the mortgagor's son being only tenant by sufferance, after default in payment of the mortgage, could not remove the machinery as trade fixtures.

In *Hope v. Cumming* (10 U. C. C. P. Hilary Term, 1861) it was decided, that a planing machine standing by its own weight on the floor without fastening, though worked by belts attached to an engine, is a chattel liable to seizure for taxes.

Donkin v. Crombie (11 U. C. C. P. Michaelmas Term, 25 Vic., 1862). This was an interpleader suit in relation to certain fixtures that were on the premises after the mill was destroyed by fire, and the question was whether they belonged to the landlord or tenant: as the facts were then stated the presumption was they belonged to the landlord.*

In *Gibson v. Hammersmith Railway Co.* (8 Law Times, N. S. 43, 22 January, 1863), Vice-Chancellor Kindersley examined the law as to fixtures, and only reiterates the difficulties mentioned by other judges in defining any clear principle on which to rest all the decisions that have been made on the subject.

After giving this case the best consideration in my power I have arrived at the conclusion that the plaintiffs have

*See *Patterson v. Johnson*, 10 Grant's Chy. Rs. 583.—REPORTER.

failed to make out their case, and principally on the ground that by their mortgage they seem to have taken their security on a certain kind of the machinery fixtures only; viz., those connected with the motive power. The words of the mortgage are: "Together with all and singular the water-wheels and flumes, outhouses, buildings, ways, waters, water-courses, privileges, profits, hereditaments and appurtenances whatsoever to the said land and premises belonging." At this time I understand the looms, carding machines, and other fixtures used in the manufacture of cloths, &c., were on the premises, and were mortgaged with the knowledge of the plaintiffs to Paterson, and had formed the subject of a separate purchase between Barton and Paterson, the former owner. The mortgage does not even declare the premises to be a woolen or cloth factory, or in any way point to any security from machinery than such as has been defined. The master of the Rolls in *Haley v. Hammersley* held, that language, which went much further than this in describing machinery, only covered the working machinery, and did not carry with it the spinning machines and fixtures of that kind. It is true Lord Campbell reversed the decision of the master of the rolls, but he did so on the ground that the conveyance of the *silk mill* and all *other machinery and fixtures* whatsoever erected, and set up, or standing, or being, or which at any time thereafter should be erected, or set up or stand, or be upon the land or mill," passed whatever machinery or fixtures that were in the premises, and used for the manufacture of silk.

In *Waterfall v. Penistone* also, it was assumed that there was a difference between the land and buildings, &c., mortgaged and the machinery and trade fixtures; for the mortgagee, Marsh, first took a mortgage on the freehold, and two and a half years or so afterwards he took, in November, 1850, a further charge for £1000 on everything comprised in his former mortgage, and for further security the mortgagor assigned to him certain machinery then upon the premises. The mortgagee afterwards, in 1853, assigned to defendant the equity of redemption of the mill and all the machinery included in the deed of 1850, and also all the

machinery erected after 1st November, 1850, and by a subsequent conveyance assigned the fixtures and machinery in dispute in that action. In giving judgment Mr. Justice Earle said, that as to the machinery passing to the mortgagee of the freehold as parcel thereof, though annexed after the mortgage, *the tenor of the instrument shewed that the parties did not so intend*, and trade fixtures as above described would not by subsequent annexation become parcel of the freehold according to *Hellawell v. Eastwood*.

The subsequent mortgage of the premises to Dr. Hunter speaks of "the land and premises known as the Dundas Woolen Works, with all the land, flumes, buildings, right of way and other appurtenances now used or belonging thereto, and also all the fire engine, boiler, machinery, and fixtures, and water-wheel, and all fixed machinery and shafting and fixtures of every kind about the same." These words would seem to be broader than those used in the mortgage to the plaintiffs, and would, I think, carry the machinery to the second mortgagee. The deed from Barton to McNab is still more explicit: the description concludes, "the said property being all that property known as the Dundas Woolen Works, with the residence built by the said Barton, and also including the brick house and frame building attached thereto, which was formerly occupied by William Slingsly, being the whole factory property and premises owned by the said Barton, together with all the machinery in the said Dundas Woolen Works and about the same now owned by the said Barton." If up to this time the looms and machinery had been the property of Barton as chattels, I cannot doubt that they passed to McNab by this conveyance; and though they might for many purposes be considered as fixtures, yet between the plaintiffs' claiming under their mortgage and Barton, and all claiming under him by subsequent conveyances, these chattels would not seem to be so annexed to the freehold as not to be immovable by them.

I am not able to convince myself so thoroughly as the learned judges in *Waterfall v. Penistone* seem to have done, that looms, spinning machines, carding machines and articles of that character placed in a woolen factory and

used and necessarily used in the manufacture of cloth, when secured by screws, nails and braces, are not fixtures, going to the heir as owner of the freehold, when placed there by the owner of the inheritance. The property in question appears to have been purchased by Barton for the purpose of a woolen factory. If he had never mortgaged the premises, and had placed in them spinning machines and other machinery necessarily used for the manufacture of cloth, and had so used these machines for that purpose continuously, and secured them to the building by nails, braces and screw nails, I should consider them fixtures passing with the freehold property. I should never imagine that he contemplated his woolen factory to pass to his heir denuded of the apparatus necessary to make cloth; nor would he purchase machinery of that description to place in his woolen mill expecting them to be enjoyed as chattels apart from his mill, nor intending to dispose of them as chattels, when in that form they would be of comparatively little value.

I think the case of *Walmsley v. Milne*, in 7 C. B. N. S., points to a more reasonable view of the law than some of the prior authorities seemed to establish; and though it does not expressly overrule *Hellawell v. Eastwood* or *Waterfall v. Penistone* on the question of what are properly considered fixtures, especially when placed in premises by the owner in fee (or mortgagor, who for the purpose of this discussion would seem to have the same rights and interests,) it nevertheless in my judgment does not from its reasoning, and the cases there referred to, tend to sustain those cases. The subsequent case of *Haley v. Hammersley*, before Lord Campbell indicates that the bent of his lordship's mind was towards the doctrines shadowed forth in the case in 7 C. B. N. S.

I am prepared to concur in a judgment for the defendant, because, taking the words of the mortgage to the plaintiffs with the surrounding facts, I do not think it was the intention of the parties to that instrument that the plaintiffs should have a claim on any portion of the machinery of the premises to secure their debt, beyond that of the description

mentioned in the mortgage, which seems to relate to the motive power of the mill.

If it became necessary to decide generally, whether machinery of the kind in question, annexed to the building as this was, placed there by the mortgagor, and used as this was, would as between the mortgagor and mortgagee be considered as a fixture constituting it as a part of the freehold premises, I should feel much greater doubt in deciding that they were mere chattel property removeable at the will of the mortgagor, than I now do in deciding in favor of the defendant as to the effect of the mortgage itself as shewing the intention of the parties to it.

It may be as well to notice that Mr. Justice Willes is said not to have concurred in the judgment of the two judges who delivered the judgment in *Walmsley v. Milne*, and Chief Justice Earle who delivered the Judgment of the Court of Queen's Bench in *Waterfall v. Penistone*, before he was appointed chief justice of the Common Pleas, does not appear to have expressed any opinion about this case in the Common Pleas. The rule will be discharged.

Rule discharged.

McKINLEY v. MUNSIE.

Action against a Justice of the Peace for arrest and imprisonment—Evidence, refusal to take bail—Nonsuit.

Where the defendant, a Justice of the Peace, had laid an information before another magistrate against the plaintiff, who was thereupon arrested under the said magistrate's warrant, and on an examination was committed for trial on a further warrant issued by the same magistrate, which turned out to have been illegal or void, and subsequently imprisoned under it, the defendant and the other magistrate having refused to admit him to bail.

Held, in an action of trespass by the plaintiff against the defendant, charging him with the arrest and imprisonment, that in the absence of any evidence that the defendant had directed the officer to take the plaintiff to prison, or had influenced the other magistrate in sending him there, or that the officer was present when the defendant and other magistrate declined to take bail and said they would send the plaintiff to prison, or that he even knew that the defendant had said anything about it, *the mere refusal* by the defendant to admit the plaintiff to bail, was not evidence to go to the jury that the defendant authorized the illegal arrest and imprisonment of the plaintiff, and a nonsuit was, therefore, ordered to be entered.

The first count of the declaration stated that defendant falsely, maliciously, and without reasonable or probable cause,

appeared before a justice of the peace and charged C. J. McKinley (the plaintiff) with having committed wilful and corrupt perjury, and upon such charge procured the said justice to the peace to grant, and he did grant, his warrant for the apprehension of the said C. J. McKinley, and for bringing him before the said justice of the peace, or some other justice of the peace, to be dealt with according to law for the said supposed offence; and the defendant, under and by virtue of said warrant, procured the said C. J. McKinley to be arrested and brought before the said justice of the peace, and the defendant afterwards maliciously and without reason or probably cause procured the said justice of the peace to grant, and the said justice of the peace did accordingly grant, his further and other warrant by virtue whereof the said C. J. McKinley was conveyed to a common goal, and there without legal cause and warrant imprisoned for a long space of time, to wit, five days, until he was duly acquitted discharged, and released out of the said goal, and out of custody and imprisonment, by an order of the Honorable the Chief Justice of Upper Canada, granted on the return of a writ of *habeas corpus*, issued out of the Court of Queen's Bench of Toronto, at the instance of the said C. J. McKinley, in relation to his said imprisonment and alleged crime; and the said chief justice having heard and considered all that the defendant could allege against the said Charles J. McKinley touching the said supposed offence, adjudged and determined that the said C. J. McKinley was not guilty of the said alleged crime, and that he had been (as the fact was) as aforesaid imprisoned without legal cause or warrant therefor; and the said C. J. McKinley by the malicious and illegal conduct of the defendant in the premises was injured in his good name, and suffered much pain of body and mind and loss of time, and was put to great expense in obtaining the said writ of *habeas corpus*, and the said order of the said chief justice in pursuance therefor and his said discharge and release thereunder from imprisonment.

The second count stated that the defendant assaulted and beat the said C. J. McKinley, and gave him in custody to a constable, and caused him to be imprisoned within the com-

mon gaol, by reason whereof the said C. J. McKinley was put to great expense and trouble in and about the obtaining of his release and discharge from such imprisonment, and the plaintiff claimed £200.

The defendant pleaded, 1st, to first count, Not guilty; 2nd, for a second plea to first count, that the said prosecution and proceedings were not determined, nor did the said chief justice adjudge and determine that the said plaintiff was not guilty of the said crime as alleged.

3rd. As to the second count, Not guilty; 4th, as to second count, that at the time of the alleged trespass in that count mentioned the plaintiff had been guilty or was suspected to be guilty of wilful and corrupt perjury, whereupon the defendant having knowledge of the circumstance went before a justice of the peace for the united counties of York and Peel, within which the said supposed offence had been committed, and who had jurisdiction in the premises, and there laid information and complaint on oath before the said justice of the peace of the said alleged offence in due form of law, whereupon the said justice of the peace issued his warrant, directed to all constables and peace officers in the said counties of York and Peel, whereby he commanded them forthwith to apprehend the now plaintiff and bring him before the said justice of the peace, or other justices of the peace for the said counties, to be further dealt with according to law, and the said justice of the peace caused the said warrant to be delivered to a constable duly authorized in that behalf, and having jurisdiction in the premises, to be executed in due form of law, by virtue of which warrant the constable arrested plaintiff and brought him before the said justice of the peace in order to have the charge investigated, whereupon the said justice of the peace, having heard the evidence in support of the charge and what was alleged and proved by the now plaintiff in answer thereto, was of opinion that the evidence was sufficient to put the now plaintiff on trial for the said offence, and therefore duly issued his warrant according to the statute in such case made and provided for committal, and did thereby commit the said now plaintiff to the common goal of the said united

counties to be thus safely kept, until delivered by due course of law, by virtue of which said last mentioned warrant the constable to whom the same was delivered for execution, being duly authorized in that behalf and having jurisdiction conveyed the said plaintiff to the common goal of the said united counties and there delivered him to the keeper thereof together with his warrant, which are the alleged trespasses in the second count mentioned.

The plaintiff took issue on the pleas of the defendant.

The cause was taken down to trial at the fall assizes to 1864, held for the united counties of York and Peel before Mr. Justice John Wilson, when a verdict was rendered for the defendant on the first count of the declaration, and for the plaintiff on the second count, damages ten pounds.

The following facts appeared from the evidence offered at the trial:

The defendant, on the 4th of July, 1864, signed an information against the plaintiff, charging him with wilful and corrupt perjury. It purported to have been sworn before Joseph Wood, a justice of the peace, but that was not proven. Plaintiff was arrested probably under a warrant issued on the information. The plaintiff was sent to prison on a warrant purporting to be signed by Mr. Wood as a justice of the peace, in which plaintiff is charged with having committed wilful and corrupt perjury. He was committed to prison on the 5th of July, and was discharged from custody on the 9th of July by an order of the Chief Justice of Upper Canada, the plaintiff having been brought before him under a writ of *habeas corpus*.

The evidence to connect the defendant with the arrest was as follows: William Coulter said, "I have talked with the defendant about the McKinleys. He said he had something against them that would put them in the penitentiary, if they did not take care. He said it was plaintiff he was speaking of: this was about a month before the arrest."

Thomas Elliott said: "On the 4th of July I went to defendant's place to bail plaintiff. Wood was there. Defendant and Wood both said they would not take bail, but send him to goal. I offered myself as bail and said I would find another. Plaintiff was sent to goal. I saw him there two

or three days after. This occurred the day he was arrested; the bail was refused. Wood lived three or four miles off and had no interest in the case."

There was other evidence applicable to the first count, as to which the verdict was for the defendant, and it is not necessary to notice it further nor the applications for a non-suit as to that count. *As to the second count*, the defendant's counsel applied for a non-suit as there was no evidence that defendant had been present at the arrest, or had ordered it, or had done more than complain, and that not on oath. Leave was reserved to move to enter a non-suit on this ground.

As to the second count, the learned judge charged the jury that if the defendant only made a complaint and left the law to take its course, although the proceedings were wrong, he would not be liable; but that if he took part afterwards and urged the proceedings on he was liable.

Robert A. Harrison, for defendant, objected to this charge on the same ground as that on which he moved for a nonsuit.

In Michaelmas term last *Harrison* for the defendant obtained a rule *nisi* to set aside the verdict for the defendant on the second count and to enter a non-suit pursuant to leave reserved upon the grounds, that there was no evidence to shew that the defendant committed the trespass in that count alleged, and that defendant's second plea, being the plea of justification or excuse, was proved; or why the said verdict should not be set aside and a new trial had between the parties upon the grounds, that the said verdict was contrary to law and evidence, inasmuch as there was no proof of the defendant's having been such a trespasser as in the second count alleged; and that defendant's second plea, being the plea of justification or excuse, was proved; and for misdirection of the learned judge who tried the cause, in telling the jury that there was evidence for their consideration in support of the said second count of the declaration; or why the said verdict should not be set aside as being contrary to evidence and the weight of evidence, and a new trial had between the parties. The rule was enlarged until Hilary term last when

J. O'Connor shewed cause.

There was some evidence to go to the jury that defendant participated in the arrest. *West v. Smallwood*, 3 M. & W. 418, is authority for the plaintiff. There the complainant having accompanied the constable charged with the execution of the warrant, and pointed out to him the person to be arrested, it was held that that was evidence to go to the jury of a participation in the arrest. In *Wheeler v. Whiting*, 9 C. & P. 262, telling a policeman to take charge of B, is the same as telling him to take B into custody, and is sufficient to support an action for false imprisonment by B against A, who told the policeman to take him in charge. If there was any evidence to go to the jury the verdict will not be disturbed, being under £20 and no right involved.

Harrison, contra.—The defendant is not liable in trespass for making the charge or anything arising out of it. If he stated the facts fairly to the justice of the peace he cannot be made responsible for any mistakes or omissions of the magistrate; and even detaining him in custody when before the justice of the peace on a suggestion that he had been guilty of an offence, would not sustain an action, unless it was done maliciously and without reasonable cause. Defendant in fact only set the law in motion, and can only be liable for doing so maliciously and without probable cause: *Barber v. Rollinson*, 1 C. & M. 330, S. C. 3 Tyr. 266; *Smith v. Evans*, 13 U. C. C. P. 60; *Grinham v. Willey*, 4 H. & N. 496; *Cronshaw v. Chapman* 7 H. & N. 911.

The only evidence to go to the jury of the adoption, approval, or direction of the arrest under the void warrant is at best equivocal. It may mean that he considered he was applied to as a justice of the peace to bail the accused, and that he in that capacity declined doing so. If the evidence given is quite as consistent with one view as the other, the party on whom the onus lies of proving the fact fails to make out his case: *Midland Railway Company v. Bromley*, 17 C. B. 372, per Crowder, J., 382; *Trew v. Railway Passenyer Insurance Company*, 6 Jur. N. S. 760, per Watson B., S. C., in Exchequer chamber 4 Law Times N. S. 833.

If defendant is to be considered as ratifying the act, he must have had full knowledge of the act intended to be ratified; and the ratification must be complete and full: *East-*

ern Counties Railway v. Broom, 6 Ex. 314; *Wright v. Woolen*, 7 L. N. S. 73.

Richards, C. J., delivered the judgment of the court.

I gather from the report of what took place at the trial by the learned judge who presided, and from the argument on this rule, that the defendant was a justice of the peace and was also the complainant in the case before the magistrate, who issued the warrant against plaintiff; that after the warrant had been issued to send plaintiff to goal on the 4th of July, Thomas Elliott went to defendant's place to offer himself as bail for plaintiff, and said he would get another to go bail with him; that Wood, the magistrate who signed the warrant, was at defendant's house; and that they both said they would not take bail but send the plaintiff to gaol. It is not shewn that defendant directed the constable to take plaintiff to gaol, or that the constable was present when defendant refused to take bail and said they would send plaintiff to gaol, or that he even knew defendant had said anything about it. The fact that defendant was a justice of the peace as well as Wood, and that Elliott made application to them to bail plaintiff, would imply that Wood had decided not to bail plaintiff on the charge, and if the warrant for that purpose had actually been delivered to the constable, I fail to see how defendant's declining to bail him could be evidence to go to the jury that he authorised or directed the illegal arrest and sending of plaintiff to gaol. Is not the fair inference from the language used in connection with the application to bail this, "we refuse to admit the prisoner to bail, and, therefore, he must be sent to gaol under the decision of the magistrate?" Defendant might in a matter in which he could properly act, and was bound to admit a person charged with an offence to bail, perhaps, be prosecuted for maliciously refusing to take bail, but that would be quite a different proceeding from bringing an action of trespass against him because some other magistrate had sent the prisoner to gaol on a void or illegal warrant. Taking the defendant's answer in connection with the application to bail, and in the absence of facts to shew that this answer had anything to do with the illegal arrest and imprisonment

complained of, so far as authorising or directing it, and considering on the contrary that what defendant said was rather an intimation that he would not take bail, and in that way declined to prevent plaintiffs being sent to gaol, we think there is no evidence to sustain the verdict for the plaintiff on the second count of the declaration. If defendant by any act of his own directed the constable to take the plaintiff to prison, and was in that way an active participator in the arrest, then he might be liable on the second count of the declaration; but if his connection with it consisted in his declining to take bail and giving it as his opinion that as a consequence of that decision, or even of the decision of the other justice of the peace, that plaintiff must go to prison, without in any way directing the officer to take him there, or influencing the magistrate to send him there, then I think defendant would not be liable in this action of trespass as set out in the second count of the declaration. On the whole, we think the rule must be made absolute to enter a nonsuit.

Rule absolute to enter a nonsuit.

BAXTER V. BAYNES.

Unstamped promissory note—27 & 28 Vic., ch. 4—Pleading.

Where the defendant neither denied the making of the note sued on, nor pleaded the absence of a stamp, *Held*, that a defence on the latter ground could not be urged.

Seemle, 1. That the only mode of raising the defence of the want of a legal stamp is by a plea denying the fact. 2. That such plea would be displaced by evidence shewing that the instrument had been properly stamped at the time of signature, and initialed by the maker, but had been rubbed off, defaced, or improperly removed by some one else; that on these facts being shewn the note would not be void, and that the defendant would be relieved from the penalty under the act.

The declaration stated that the defendant, on 29th September, 1864, by his promissory note then over due, promised to pay Baxter & Galloway or bearer \$550 with interest one month after date, and Baxter & Galloway delivered the note to the plaintiff, who became the bearer thereof, but the defendant did not pay the same, and the plaintiff claimed £175.

The defendant pleaded, 1. That he was induced to make the note by the fraud of the plaintiff. 2. That he made the note and delivered the same to the plaintiff without value or consideration for his so doing, or for his paying the amount thereof, or any part thereof, and that plaintiff always held the note without any value or consideration. 3. A plea of set off for money lent, money received, money paid, interest, and on an account stated.

The plaintiff took issue on all the pleas. The cause was taken down to trial at the last winter assizes for York and Peel before Mr. Justice Morrison, when a verdict was rendered for the defendant.

The transaction between the parties arose out of the purchase by the defendant and another person, named Roberts, from the plaintiff and one Smith of the schooner *Sultana*: the agreement was reduced to writing and signed by the parties. Smith, who was the captain of the vessel, owned one-third of her prior to the sale, and in addition to \$50 a month had one-third of the profit of the vessel: under the written agreement he was still to have \$50 a month for running the vessel, and one-third of the profits. Roberts subsequently sold his interest in the vessel to defendant. There was no dispute as to the \$1000 paid at the time of the sale of the vessel; but it seems to have been contended on behalf of the defendant that Smith, the captain, was not entitled to one-third of the profits during the time he ran the vessel, when he, defendant, was interested in her, and there was some further dispute about an anchor. There had been a payment made by defendant to plaintiff of \$1000 in U. S. paper money, and there was a dispute between plaintiff and defendant how this money should be received; at what discount, if any. Plaintiff insisted that he should receive \$550 from defendant to make up this payment to \$1000 in Canada money, which was then understood to be the balance on the purchase of the vessel. It further appeared that plaintiff was unwilling to allow what defendant claimed, because, he said he had given a receipt for the money, and if that was produced it would show on what terms he had received it. Subsequently defendant gave plaintiff the promissory note sued on for \$550.

The evidence to show the state of the accounts between the parties was gone into at the trial apparently without opposition, and from what was stated by the defendant's witnesses there can be no doubt that in addition to the \$50 a month Smith, the captain, was to receive one-third of the profits for sailing the vessel during the period he ran her, after defendant became interested in her. The note sued on was dated 15th September, 1863, and payable one month after date to Baxter & Galloway or bearer. This was explained from the fact that there were in the premises where plaintiff transacted his business printed forms of blank notes payable to Baxter & Galloway or order, and one of these was filled in to save the trouble of writing a note. It was filled in in the hand writing of Galloway, who stated that he had no interest in the matter whatever. Before the date of this note, according to the statement of defendant's first witness, plaintiff had received the \$1000 in United States notes and the witness stated that defendant owed the plaintiff \$1000 in Canadian currency, and they endeavored to arrange about that. Defendant wished plaintiff to pass the United States notes to his credit at the rate current when plaintiff received them: this plaintiff declined to do, as he said he only considered it borrowed as so much United States funds: this conversation was in July, 1864, before the giving of the notes.

The principal witness for the defendant was one James Pickard, who said he was present at Port Nelson on the 23rd of December, 1863, in defendant's bar-room, when plaintiff came in and asked defendant if he had the balance due on the Sultana, : he said he had not, except in American money. Plaintiff asked if he had a thousand dollars : he said he had, and plaintiff said that would do, and defendant then gave it to plaintiff. Defendant asked what it was worth then: Plaintiff said it was worth something like seventy cents on the dollar. Plaintiff said that when he came down he would give him a deed of the vessel. On cross-examination he stated he could not say for certain whether a paper was signed or not ; that there was no dispute as to the amount due: he did not understand the balance due was \$1000: there was no amount mentioned as being due: plain-

tiff asked defendant if he could let him have \$1000 of the American money. He could not say plaintiff said he would take it at seventy cents. He understood the money was taken as a payment: he supposed so, as plaintiff said to defendant that when he came up he would make him a deed of the vessel. On re-examination he said that he had heard nothing of it being a loan of money from defendant to plaintiff. The value of the United States currency 25th December, 1863, in Toronto, was sixty-six and two-third cents to the dollar, thus making \$1000 American currency equal to \$666 66 in gold: on the 25th September, 1864, it was fifty-two cents in the morning and fifty-five in the evening to the dollar. The plaintiff called Galloway, who drew the note or was a subscribing witness to the agreement. He explained the dispute when the parties met in July, and on the final settlement, to be this: plaintiff contended that the receipt he gave would shew he only took the United States notes to be returned, or to be settled for as American money on the final settlement. Defendant denied this and offered to close by giving \$550 in addition to the United States notes plaintiff had received in full of the £1000 and interest then due. Plaintiff declined, wanting \$600 or \$650. When they met in September Galloway advised plaintiff to accept the \$550 and the amount paid in United States currency for the sake of peace. Plaintiff finally agreed to do so, receiving the note sued on for that amount, and plaintiff then transferred the vessel to him. Galloway further stated that at the time the note was given defendant was indebted to plaintiff in the sum of \$622 08 on an exact computation of interest, without crediting the defendant with the \$550 note; and against this defendant would have the claim for the value of the \$1000 in United States currency and interest.

The learned judge left the case to the jury to say, whether the note was given on a good consideration or not, stating that in his opinion there was no evidence of fraud being practiced to induce defendant to sign the note.

The defendant's counsel objected that he ought to have told the jury, that if the plaintiff represented to defendant that there were \$550 due at the time of the giving of the note and it was not so, it was for them to say for what amount

was due. The learned judge stated that he saw no such representation in the evidence to which he could call their attention with their view.

The plaintiff's counsel objected that he should have told the jury, that, notwithstanding the evidence of Pickard, there was a good consideration for the giving of the note, and that if there was any consideration the verdict should be for the plaintiff, the amount not being divisible, and also on the whole evidence there ought to be a verdict for the plaintiff under any view of the case. The jury found a verdict for the defendant.

Robert A. Harrison obtained a rule *nisi* to set aside the verdict without costs, on the ground of non-direction in this, that the learned judge refused to tell the jury that whether they believed Pickard or not there was a valuable consideration shewn for the giving of the note sued upon; that if any consideration were shewn, the consideration was entire and plaintiff entitled to recover the full amount of the note; and that jumping accounts or giving the deed of the vessel as proved was a valuable consideration sufficient to entitle the plaintiff to recover. Or, why the said verdict should not be set aside, and a new trial had without costs, or costs to abide the event, on the ground that the verdict was contrary to law, evidence, the weight of evidence, and the judge's charge, in this, that there was no evidence to support the plea of fraud, and the learned judge so ruled; and the evidence shewed a valuable consideration for the giving of the note sufficient to entitle plaintiff to a verdict for the whole amount, or some part thereof. Or, why upon payment of costs the said verdict should not be set aside, and a new trial had between the parties, upon the ground of the discovery of new evidence; viz., the testimony of John Waldie, and on grounds disclosed in affidavits and papers filed.

F. McKelcan shewed cause.—The accounts kept on board the vessel and the entries made shew that if the earnings of the vessel were properly credited to defendant there would be nothing due the plaintiff. The whole question was one of fact and was submitted to the jury with a charge not unfavourable to the plaintiff, and as they have found for the

defendant the verdict ought not to be disturbed : *Regina v. Chubbs*, 14 U. C. C. P. 32, and authorities there referred to. The facts proved at the trial shew no consideration for the note, or at all events no sufficient consideration, as the defendant was clearly not indebted to the plaintiff in the amount of the note, and therefore plaintiff is not entitled in any view to the verdict for the full amount. *Edwards v. Baugh*, 11 M. & W. 641; *Southall v. Rigg* and *Forman v. Wright*, 11 C. B. 481; *Bell v. Gardiner*, 4 M. & G. 11; *Wilkes v. Kornby*, 11 W. R. 742 (Ex.); *Barber v. Backhouse* 1 Peak. N. P. 61; *Ledger v. Ewer*, 1 Peak. N. P. 283; *Darnell v. William*, 2 Starkie, 166; *Clark v. Holnes*, 2 F. & F. 72: Byles on Bills, 8 Ed. 119; Addison on Contracts, 8 Ed. 5, 6. Performing a legal obligation is not a sufficient consideration for the promise, and if plaintiff was bound to transfer the vessel, his giving a deed of it was not a sufficient consideration for the note : *Cowper v. Green*, 7 M. & W. 633. The note was void for want of a stamp, : 27 & 28 Vic. cap. 4, sec. 9. The defendant under that section would be liable to a penalty if he paid it without a stamp. Application was made at the trial for leave to add a plea raising this question, but was refused.

Robert A. Harrison, contra.—There was no evidence of fraud. The argument was clear and express that the captain was to have one-third of the profits of the season for sailing the vessel, besides \$50 a month; and in that respect plaintiff's case was satisfactorily made out. The jumping of accounts, as it is called, is a good consideration for the note, as was also the giving up on the argument and the assigning of the vessel, and the considerations is not divisible : Addison on Contracts, 31 & 48; Chitty on Contracts, 44 & 46; *Lundy v. Carr*, 7 U. C. C. P. 371. The learned judge refused to tell the jury that the evidence as to consideration was inadmissible. He also cited *Trickey v. Larne*, 6 M. & W. 278; *Dixon v. Paul et al.* 4 O. S. 327; *Kellogg v. Hyatt*, 1 U. C. Q. B. 445; *Hill v. Ryan*, 8 U. C. Q. B. 443; *Coulter v. Lee*, 4 U. C. C. P. 201. The making of the promissory note is not denied, and the defendant if intending to set up the illegality should have pleaded it under the 8th rule of Trinity term, 1856 : *Lazarus v. Cowie*, 3 Q. B. 459; *Field v. Wood*, 7 A. & E. 114.

RICHARDS, C. J., delivered the judgment of the court.

As to the want of a stamp, the 9th sec. of stat. 27 & 28 Vic., cap. 4, in effect provides, "if any person signs, becomes a party to, or pays any promissory note, draft, or bill of exchange, chargeable with duty under this act, before such duty (or double duty as the case may be) has been paid by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of \$100, and, except only in case of the payment of double duty as hereinafter mentioned, such instrument shall be invalid and of no effect in law or equity; and the acceptance or payment or protest thereof shall be of no effect, except that any subsequent party to such instrument or person paying the same may at the time of his so paying or becoming a party thereto pay such double duty by affixing to such instrument a stamp or stamps to the amount thereof. * * * * And such instrument shall thereby become valid, but no prior party who ought to have paid the duty thereon shall be released from the penalty by him incurred as aforesaid; and in suing for any such penalty the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps affixed to any instrument shall be *prima facie* evidence that such party did not affix such stamp as required by this act."

The 8th rule of court of Trinity term, 1856, is, "In every species of action or contract, all matters in confession or avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratia*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, endorsing, accepting bills, &c., or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded."

It was provided by Imperial statute 13 Geo. III. cap. 25, sec. 19, to which Imperial statute 55 Geo. III. c. 184, sec. 8, refers, that "unless the paper on which a bill or note be written be stamped with the proper duty or a higher duty, it shall not be pleaded or given in evidence in any count or admitted to be good, useful, or available in law or in equity." Sec. 17 of 3 & 4 Wm. IV. of Imperial statute, cap. 97:

“When the commissioners of stamps shall discontinue the use of any dies and provide fresh ones in lieu thereof, and give the proper notice thereof, the new dies shall be the only true ones for denoting the duty to be charged in any case, to which the dies are applicable, and all deeds and instruments for the marking or stamping of which any such new dies shall have been provided, and which shall be engrossed, written, or printed on vellum, parchment or paper, stamped or marked with any other dies than the said new dies so provided, shall be deemed to be engrossed, written or printed on vellum, parchment or paper, not duly stamped or marked as required by law.”

Under the English stamp act if an unstamped bill is read in evidence before an objection has been taken to it the court will not allow the defendant to take the objection afterward. In an action on a banker's draft the defence was that it was post dated. The effect of such post dating under 55 George III. cap. 184, is, that they do not come within the exception as applicable to that description of drafts, relieving them from the necessity of being stamped unless properly dated; and the plea amounted to this that no banker's draft was made, the plea in fact being that the defendant did not make the said draft *modo et forma*. It was contended that the defendant ought to have pleaded this matter specially, but the court were of opinion that the defence could be set up under the general issue. In argument it was contended that from the facts shewn and for want of the stamp the bill could not be given in evidence, and that it would be improper to plead that a document was not evidence. *Field v. Woods* (7 A. & E. 114) is authority on both points, and refers to the effect of the English stamp acts. In *Dawson v. Macdonald* (2 M. & W. 26) the action was against the acceptor of the bill. The defendant obtained an order for an inspection, and also an order to plead several matters; viz., 1. He did not accept the bill. 2 & 3. Denying the drawing and endorsing. 4. A special plea, raising the defence that the bill was written on paper stamped with an old die, in contravention of Imperial statute 3 & 4 Wm. IV. cap. 97, sec. 17. Plaintiff obtained a rule to strike out the fourth

plea, as the matter thereby pleaded might be given in evidence under any of the other pleas, or at all events under the plea of non-acceptance. Parke, B., said, "the only consequence of wrong stamping is, the bill could not be given in evidence. * * * There can be no question this defence is admissible under the plea of non-acceptance."

In *M'Dowal v. Lyster* (2 M. & W. 52) the defendant in an action against himself, as the drawer of a banker's cheque pleaded it was given to secure a gambling debt, and plaintiff was a holder of it without consideration. The defendant's counsel moved to add a plea that the cheque was drawn at a distance from the place where it was made payable, and was falsely dated in contravention of the provisions of 9 Geo. IV. cap 49, sec. 15 :

Per Curiam.—"The court will not interpose to assist the defendant in defeating an instrument, which he has knowingly executed in an illegal manner. If he wished to raise this defence he should have pleaded he did not make the cheque declared on."

In *Lazarus v. Cowie* (3 Q. B. 459), the action was by the endorsee of a bill against the acceptor. The defence set up was that the acceptance was for the accommodation of the drawer and without consideration; that before the endorsement to the plaintiff the drawer negotiated the bill for his own use and paid it when due, and it was re-delivered to him, and after it was due the drawer endorsed it to plaintiff without being re-stamped, or payment of any duty in respect of re-issuing it; and that the plaintiff before endorsement to him had notice of the premises. On special demurrer it was held the plea was good, and in giving judgment of Lord Denman concludes as follows : "It is said, however, that the stamp acts do not make a bill without a stamp void, but only forbid it being received in evidence. That may be so in some cases, but the 19th section of Statute 5 Geo. III. cap. 184, expressly prohibits the re-issuing a bill of exchange which has been paid, and inflicts a penalty of £50 on any person doing it. A bill issued contrary to such a prohibition is certainly void."

The plaintiff's counsel in argument contended that the defect of stamp was only available by taking the objection at the trial, so as to cause the rejection of the instrument as inadmissible in evidence. According to the established practices, if the objection is not taken at the proper time the judge will direct the jury that there is a valid legal instrument giving a good cause of action.

I think by analogy these authorities shew that the defendant, under the pleadings, cannot properly set up the defence that the note was not properly stamped, for he does not deny the making of the note; so that that fact being admitted on the record I fail to see under what plea the objection can be raised. According to the views expressed by Lord Denman in the case in 3 Q. B., and under our 8th rule above quoted, the pleading of the want of a stamp would seem to be the most regular and convenient way of bringing up the defence. Suppose a proper stamp had been placed on the note at the time it was signed, and had been properly initialed by the maker, and had subsequently got rubbed off, would the note be void? and if these facts were shewn in answer to a plea denying that the note was properly stamped, would they not displace the plea? That the absence of the stamp properly initialed is only *prima facie* evidence in an action to recover the penalty would seem to imply, that if the stamp had been properly placed thereon and defaced, and had been lost or removed by some one improperly afterwards, that the *prima facie* case would be answered, and the defendant freed from the penalty. Without expressly deciding that the only mode of raising the question of want of a legal stamp on a bill or note is by pleading it, I have a rather strong opinion that such will be found to be the proper way of doing so.

As to the merits. It appears from the written agreement between the parties, that on the 22nd of September, 1862, defendant and one Roberts bought from plaintiff and Charles Smith the schooner Sultana for \$3,000, of which \$1,000 of the purchase money was paid down, and the balance of \$2,000 was to be paid in six and nine months, and the earning of the vessel to be pledged for the balance. The vessel was to be transferred by the seller when the balance

was paid in full. The purchasers were to keep the vessel insured for \$2,000 until the balance was paid; the then master (Smith) to continue master of the vessel at \$50 a month and participate in the profits of the vessel as he formerly did with plaintiff; the books were to be made up at the end of the season from the date of sale, and Baynes and Roberts to be credited with two-thirds of the nett earnings from that date; and what balance remained unpaid at the end of the season, after deducting the earnings of the vessel, the purchasers were to pay within six and nine months from the date, with interest at seven per cent.

On the 22nd of June, 1863, Roberts sold his interest in the vessel to defendant.

There can be no doubt this agreement was entered into by the defendant: all the evidence clearly points to that; and there can be no reasonable doubt, from the evidence, that according to the agreement Smith was to have one-third of the profits of the vessel whilst he ran her, in addition to the \$50 a month. If the defendant's complaint as to fraud was based upon the fact that he was rightfully entitled to have the one-third share of the profits, that was given to Smith, then he failed to make out his case: there was no evidence to sustain that view of the case. One of the witnesses speaks of defendant complaining of Smith getting one-third of the profits, but plaintiff said that was the agreement, and all the evidence shews it was.

The whole evidence then rests on Pickard's evidence, and that seems to me rather to show that as to the American money plaintiff wanted \$1000 of that currency: defendant had it and gave it to him. He did not in terms, or by reasonable implication, admit defendant only owed \$1000 in American money. He asked if he had the balance due on the Sultana: defendant said he had not, except in American currency. Plaintiff asked him if he had \$1000: defendant said "Yes," and plaintiff said that would do. We cannot say that he meant that would do to satisfy his claim, but rather that was all he, plaintiff, wanted of those funds, and notwithstanding Pickard's reason for supposing that was all that was due, viz., that plaintiff said he would make him a deed of the vessel. We think that is not the proper inference

to draw from it when taken in connection with the evidence of Bastido, a witness called by plaintiff, who stated that there was no dispute in July as to the fact that defendant owed a balance of \$1000 on the vessel, subject to the settlement of the difficulty as to the amount of discount that should be allowed on the \$1000 of American funds; and when taken in connection with Galloway's evidence, there can be no reasonable doubt on the subject.

The only question which could arise in the case as affording any possible ground of fraud, or want of consideration, was the terms on which the \$1000 in American funds were paid, and the evidence on this point is again that of Pickard. Defendant asked what American funds were worth at that time, and plaintiff said seventy cents on the dollar. At the time of the settlement the same description of funds were worth in the forenoon fifty-two cents to the dollar, and in the afternoon fifty-five, showing fluctuations in value then; and doubtless from December to July, and from that time to the settlement there had been, perhaps, greater fluctuations.

This matter then was in dispute. Both parties were well aware of it, and it seems without doubt that defendant consented to settle on the terms of giving this note. Plaintiff always insisted that the receipt he gave for the \$1000 should be produced, and that would shew the true understanding between the parties in relation to it. Defendant never did produce it, and would not produce it on the trial. He well knew plaintiff always insisted that the receipt would shew the understanding between the parties about that transaction: he never seems to have denied that he had the receipt, and he never has produced it. Under these circumstances he at least shews but a weak case as to the money being received as a payment on account of the purchase of the vessel at any rate of discount. This matter was undoubtedly, as the evidence shews, in dispute between the parties, and so far from shewing any fraud or undue pressure it appears that plaintiff accepted defendant's own offer, to receive the note for \$550 in full of the balance and as settling all disputes about the American currency.

Under these circumstances it would be laying down a very dangerous rule to say on such evidence as was here given,

that transactions closed in the way this was could be again opened, and evidence gone into to set aside what appears to have been a settlement satisfactory to the parties, who have changed their positions since, and compel the parties again to prove items and agreements in relation to their dealings, which they had themselves deemed satisfactorily closed. When the party himself seeking to open up the transactions declines to produce evidence within his power to explain the most ambiguous part of it, and asks that presumptions shall be made in his favor in the absence of the document affording the information, he is asking us to aid him to an extent beyond which courts of law do not generally go.

As to the alleged want of direction, it does not appear that the plaintiff put his case before the jury on the ground that there was only a partial failure of consideration, and that his claim ought only to be reduced *pro tanto*; and if that view of the case was only suggested after the jury retired, then the judge could hardly be expected to call them back to place a new case before them which had not been set up by either party. The learned judge appears to have charged strongly in favor of the plaintiff on the principal ground: we think the evidence clearly sustained the plaintiff's case, and that the verdict for the defendant was not warranted by it. We are therefore of opinion there should be a new trial. We say nothing about costs.

Rule absolute for new trial.

IN THE MATTER OF O'NIEL AND THE CORPORATION OF THE UNITED COUNTIES OF YORK AND PEEL.

Purchase of public roads from Government by County Council—Price and time of payment—By-Law unnecessary—Con. Stats. U. C., cap. 54, sec. 226, C., cap. 28, sec. 76.

The county council of any municipality has power, under Con. Stats. U. C., cap. 54, sec. 226, to contract with the government for the purchase, at a price beyond \$20,000, of any public works, roads, &c., in Upper Canada, and to issue debentures for the payment thereof in twenty years, without a by-law being passed to authorise the same.

Semble, that if it be thought desirable to pass such a by-law it need not be first submitted to the ratepayers for assent thereto.

Con. Stats. C., cap. 28, sec. 76, specially authorise the sale to any municipal council by the government of the public roads lying beyond the limits of any municipality.

In Hilary term last *J. Blevins* for T. H. O'Neil obtained a rule *nisi* to quash with costs the following by-law or resolution of the council of the said corporation passed on 2nd November last.

“That the warden be, and he is hereby instructed, to enter into an agreement with the government to pay them for the York roads the sum fixed by the arbitrators appointed to settle the price, in six per cent. debentures running twenty years, in accordance with the original proposition, and that the seal of the corporation be affixed to this resolution.—
Adopted.

(Signed) “WILLIAM TYRRELL, *Warden*.

“2nd November, 1864.

[L. S.]

(Signed) “J. ELLIOT, C. C.”

The following grounds were taken in the rule :

1. That being a by-law or resolution for raising upon the credit of the municipality of the united counties a sum of money exceeding twenty thousand dollars, not required for its ordinary expenditure, and not payable within the same municipal year, it was not before the final passing thereof, or at any time, submitted to the electors of the said municipality for their assent, nor had it ever received such assent as required by the municipal institutions, &c., of Upper Canada; and that the said by-law or resolution was uncertain in not fixing the amount for which the said debentures should be issued.
2. That the said by-law or resolution did not ascertain or state the amount of ratable property of the said municipality, nor the amount of the debt created thereby, or intended to be paid, nor the total amount required to be raised annually by special rate for the payment of the said debt and interest, nor the amount of the whole ratable property of the said municipality, according to the last revised assessment rolls, nor the annual special rate in the dollar for paying the interest and creating an equal yearly sinking fund for paying the principal of the said new debt intended to be created. That no rate, or other provision whatever, was stated or made by the said by-law or resolution to meet or pay off the said debentures, or the interest thereon, nor was there any other by-law providing for the same, or supplying the said several

defects. That a portion of the said road was without the limits of the said corporation, and lay within the limits of the county of Ontario, an independent municipality. Or, why that portion of the said by-law or resolution, which authorised the issuing of debentures, should not be quashed with costs for all or any of the reasons aforesaid, and on the grounds, that the same was uncertain in not fixing the amount for which the said debentures should be issued, and on grounds disclosed in affidavits and papers filed.

The affidavit of O'Neil, besides shewing that he was a freeholder in the township of Vaughan and a ratepayer, and interested in the by-law, and that his attorney procured the copy of the by-law or resolution annexed to his affidavit, stated that he had not become aware of the passing of the said by-law or resolution until some time after Michaelmas Term last; that he was informed and believed that the arbitrators referred to in the by-law or resolution fixed the price to be paid by the said corporation to the government for the said roads at seventy-two thousand five hundred dollars, and that he was also informed and believed that the corporation were immediately about to issue debentures by authority of the said by-law or resolution for the purpose of raising the said sum of \$72,500 on the credit of the said municipality.

There was also an affidavit by James Cotton, that he was well acquainted with the roads known as the York roads, and especially that portion thereof called the Kingston road, the management of which he had superintended for some time. The Kingston road extends from the city of Toronto, beyond the limits of the said united counties, into the county of Ontario about three-quarters of a mile.

During the term *D. McMichael* and *Robert A. Harrison* shewed cause. The by-law or resolution does not create the debt in terms, but authorises an agreement to be entered into to pay for the roads in a certain way; and if it does not create the debt the municipality may properly pass the resolution. It is under seal, and in that respect complies with the requirements of Consolidated Statutes of Upper Canada, cap. 54, sec. 189, to constitute it a by-law. Courts will endeavor to construe the by-law so as to give it effect:

Cameron v. Municipality of Nissouri, 13 U. C. Q. B. 190. There is nothing illegal on the face of this by-law: sec. 226 authorises the council to contract the debt, and the resolution merely authorises the warden to enter into an agreement to pay in a certain way. There is nothing on the face of this resolution to shew that any debentures are to be issued under it, and the court will not look behind the resolution to see if anything that may be illegal will be done under it: *Secord v. The Corporation of the County of Lincoln*, 24 U. C. Q. B. 142.

J. O'Connor, contra.—None of the provisions of sec. 223 and 224, of the statute referred to, have been complied with in this by-law. It does not name the day on which it is to take effect: it does not settle a special rate per annum; nor shew the amount of ratable property in the municipality; nor any means of paying off the debentures and interest. There is no other by-law supplying these defects; and what is a more serious objection, the by-law or resolution was not submitted to the electors for their assent before or since the passing thereof. The by-law in fact creates and raises a sum of money upon the credit of the municipality exceeding \$20,000, and ought, under sec. 224, to receive the express assent of the electors. The latter part of sec. 226 says, "such by-laws, debts, bonds, &c., shall be valid, though no special or other rate per annum has been settled or imposed to be levied in each year as provided by the then preceding sections;" but this does not make the by-law legal unless assented to by the electors. It may not, perhaps, be necessary that it should contain the special provision about rate per annum, sinking fund, &c., but the assent of the electors must be had, for that is not dispensed with. One of the roads extend beyond the limits of the municipality, and it is not contemplated that municipalities shall acquire property out of their limits, except for special purposes. Sections 187, 243, 331 & 339 of the statute apply more or less on this point. He cited *Clapp v. Thurlow*, 10 U. C. C. P. 533; *Paffard v. County of Lincoln*, 24 U. C. Q. B. 16; *Scott v. Peterboro*, 19 U. C. Q. B. 469; *In re Hawke v. Wellesley*, 13 U. C. Q. B. 636; *Edinburgh Insurance Company v. St. Catharines*, 10 Grant's Ch. Rs. 379; *Carroll v. Perth*, Ib. 64.

RICHARDS, C. J., delivered the judgment of the court.

I am of opinion this rule must be discharged. Under the Municipal Institutions Act, as it was first passed in 1849, the corporations thereby established had but limited powers of contracting debts, and under sec. 177 it was provided that no by-law for the creation of any debt or negotiation of any loan *should be binding* unless a special rate should be settled and other provisions made. This section and the provisions thereof were from time to time amended, under certain circumstances making publication necessary, and under 18 Vic. cap. 133, requiring a by-law for the creating of a debt to be submitted to the electors.

The Statute, 12 Vic., cap. 5, sec. 12, authorised the Governor in council to contract with any municipal council or other local corporation, for the transfer to them of any of the public roads, harbours, bridges, &c., which it might be more convenient to place under the management of such local authorities. By 14 & 15 Vic., cap. 124, any municipal corporation in Upper Canada might *contract a debt* to her Majesty in the purchase of any public roads, &c.; and such municipality might enter into, make, and execute all or any bonds, deeds, covenants, or other securities to her Majesty, which such municipality might deem fit for the payment of the amount of the purchase money of any such work and for securing the performance of any conditions of sale, and might also pass all by-laws for any of the purposes, and such by-laws, debts, bonds, deeds, covenants, or other securities, were to be valid and binding on such municipality to all intents and purposes, though no special or other rate per annum should be settled or imposed to be levied as provided under the 177th section of Municipal Corporations Act of 1849. But by sec. 3 the corporation was nevertheless authorised, in any by-law for the creation of such debt or for making or executing any such bonds, deeds, or other securities as aforesaid to her Majesty, or in any other by-law by the corporation, to impose a special rate per annum of such amount as the municipality might deem expedient for payment and discharge of such debts, bonds, covenants, or other securities, or some part thereof, and every such by-law should be valid and binding on the

corporation, although the rate settled or imposed should be less than was required by the 177th sec. of the Municipal Corporations Act, and all provisions of that act (except in so far as they were inconsistent with the act then being passed) were to apply and extend to every such by-law, and the moneys to be raised thereby, as fully as they would extend to any by-law enacted by any such municipality for the creation of any debt or raising any loan, as provided in said 177th section and to the moneys raised thereby.

By 16 Vic., cap. 181, sec. 39, it was enacted that none of the provisions of the 4th or 16th sections of the Municipal Corporations Amendment Act of 1851, should affect or apply to any by-law passed or to be passed by any municipality in Upper Canada for any of the purposes mentioned in 14 & 15 Vic., cap. 124, or to any debts, bonds, deeds, covenants or other securities, contracted, made or executed to her Majesty under the provisions of that act, or for any of the purposes therein mentioned. Under Prov. Stat. 18 Vic., cap. 133, it was enacted in effect, that no by-law to be passed for raising money on the credit of any city, town township, or village corporation should have force or effect, until the approval of the municipal electors should have been obtained.

All these provisions were repealed by the Municipal Institutions Act of 1858, and the present enactment in effect substituted for them, the provisions in the act of 1858 and in the Con. Stats. of U. C. ch. 54, in this respect being the same. By sec. 223, headed "BY-LAWS TO CREATE DEBTS, &c.," it is enacted that "every council may, under the formalities required by law, pass by-laws *for contracting debts*, by borrowing money or otherwise, and for levying rates for payment of such debts on the ratable property of the municipality for any purpose within the jurisdiction of the council; but no such by-law shall be *valid* which is not in accordance with the following provisions:

1. *The by-law, if not for creating a debt for the purchase of public works*, shall name a day when the by-law shall take effect;
2. If not contracted for gas or water works, or for the purchase of public works, according to statutes relating

thereto, the whole debt, &c., to be payable in twenty years at furthest, and, if debt contracted for gas or water works, in thirty years from day on which by-law takes effect."

3. Provides a yearly rate,

4. Of sufficient amount to discharge debt and interest, when payable;

5. Amount of ratable property irrespective of future increase;

6. By-law to recite: (1) amount of debt created and its object; (2) total amount required to be raised annually by special rate to pay debt and interest; (3) the amount of the whole rateable property of municipality according to last revised assessment roll; and (4) the annual special rate in the dollar for paying interest and creating sinking fund for paying principal of new debt.

Sec. 224 enacts, "every by-law for raising upon the credit of the municipality *any money* not required for its ordinary expenditure, and not payable within the same municipal year, shall before the final passing thereof receive the assent of the electors of the municipality in the manner provided by the 193rd section of this act; except that in counties (other than cities) the council of such county may raise by by-law (without submitting the same for the assent of the electors) for contracting debts or loans any sum over its ordinary expenditure, not exceeding in one year \$20,000."

Sec. 225—"Provided that on *such* by law for contracting the debt up to \$20,000 shall be valid, unless the same is passed at a meeting of the council especially called for the purpose of considering the same, and held not less than three months after a copy of such by-law at length as the same is ultimately passed, though with a notice of the day appointed for considering the same, has been published in some newspaper issued weekly or oftener within the county, which notice may be to the effect" of the form given.

S.c. 226—Under the title of "PURCHASE OF PUBLIC WORKS."—"1. Any council *may contract a debt* to her Majesty in the purchase of any of the public roads, harbours, bridges, &c., or other public works in Upper Canada, and may execute such bonds, deeds, covenants, and other securites to her Majesty, as the counsel may deem fit for the

payment of the price of any such public work sold or agreed to be sold or transferred to such municipal corporation, and for securing the performance and observance of all or any of the conditions of sale or transfer; and also may pass all necessary by-laws for any of the purposes aforesaid; and all such by-laws, debts, bonds, covenants, and other securities shall be valid although no special or other rate per annum has been settled or imposed to be levied in each year, as provided *by the three last preceding sections of this act;*"

"2. But any council may, in any by-law to be passed for the creation of any such debt, or for the executing any such bonds, deeds, covenants or other securities, or in any other by-law, to be passed by the council, settle and impose a special rate per annum, of *such amount* as the council may deem expedient, in addition to all other rates to be levied in each year upon the assessed ratable property within the municipality, for the payment and discharge of such debt, &c., or some part thereof; and the by-law shall be valid, although the rate settled or imposed thereby be less than is required by the said sections last mentioned; and the said sections shall so far as applicable, apply and extend to every such by-law, and the moneys raised or to be raised thereby as fully in every respect as such provision would extend or apply to any by-law enacted by any council for the creation debt as provided in the said sections, or to the moneys raised or to be raised thereby."

"3. The council of any municipal corporation purchasing any claims due to government for moneys advanced to public works, may raise by assessment the sum necessary to pay the consideration agreed upon."

Consolidated Statutes of Canada, cap. 28, sec 76, contain similar provisions with 12 Vic., cap 5, sec 12, for the Governor in council entering into arrangements with any municipal council for the transfer to them of any of the public roads, harbours, &c., (whether within or without the limits of the local jurisdiction of such council,) which it is found convenient to place under the management of such local authorities. And the municipal council may enter into such arrangements, and may take and hold any such works

so transferred, and all moneys payable to the province under the conditions of any such grant (transfer) shall be carried to the credit of the (provincial) sinking fund.

Looking at these enactments as applying to the question before us, I think we may assume that under the Municipal Institutions Acts passed in 1849, and amended from time to time since, in relation to contracting debts beyond \$20,000 in one year, and not to be paid within the year, (except for the purchase of public works, to which I shall presently advert,) such debts can only be created by by-laws of the municipality, and such by-laws will not be valid or binding on the municipality unless passed according to the requirements of the 177th section of statute of 1849 and its subsequent amendments. One of the primary features of all such by-laws was that the debt should be paid in twenty years, and there should be a special rate levied annually for raising the interest and sinking fund necessary to pay such debts within that period; and the municipality of course could not raise money or contract a debt for any purpose for which they were not authorised by law so to do. On the passing of 12 Vic., cap. 5. under sec 12 of that act, municipal councils were authorised to acquire from the government any of the public works therein mentioned, and they could for that purpose have passed by-laws creating debts to pay for them. Such by-laws to be legal must have fixed the period within twenty years when the debt would be paid, and also the special rate per annum to pay the debt and interest, for that was the only way they could have made a legal by-law for contracting the debt, and a by-law was the only mode by which they could legally contract a debt. After the passing of 14 & 15 Vic., cap. 124, any council might *contract a debt* to her Majesty to the purchase of any of the public roads, &c., in Upper Canada, and might execute bonds, deeds, &c., as the council might deem fit for the payment of the price of such works. Now, if the enactment as to the power of the council had stopped at this point, there would be no dispute as to their being authorised to contract the debt, and to execute such bonds, deeds, covenants, &c., as to them might seem meet for the purchase of a road from the government. The further power seems rather cumula-

tive than restrictive, “ and may also pass all necessary by-laws for any of the purposes aforesaid, and all such by-laws shall be valid though no special rate or premium had been settled. “

Until the passing of 18 Vic., cap. 133, any municipality could without doubt have contracted a debt and passed a by-law for any purpose connected with the purchase of a public work from the government, without the special requirements of the Municipal Act as to by-laws for contracting other debts being carried out. On the passing of that act every municipality, except a county municipality, was required to submit by-laws for raising money or contracting debts to the vote of the electors. Now, did this act compel a municipality before contracting a debt with the government for the purchase of a government work, to pass a by-law authorising that to be done? I do not think by the passing of that statute the former power of buying from, and contracting a debt to the government was entirely taken away; at all events, that provision did not extend to county councils with whom we now have to deal, and the enactment applying that prohibition to country councils was first introduced in Municipal Institutions Act of 22 Vic., cap. 99, sec. 223, from which it is consolidated as sec. 224 of cap. 54 of Con. Stat. of U. C. Though thus introduced for the first time so as to apply to by-laws of county councils contracting debts in any one year exceeding \$20,000, in the same statute as well as the consolidated act the provision, that the council may contract debts to her Majesty for the purchase of roads, harbours, &c., is likewise contained. These provisions being now all contained in the same statute must have force, one cannot properly over-ride or displace the other. The right to contract the debt to her Majesty in the purchase of the roads exists independent of any by-law under the provision of the statute. The right to execute bonds, deeds, covenants, and other securities for the payment of the price of such works also exists in the same way. So far, therefore, it appears to me the right of the municipality to enter into an agreement with the government to pay \$72,500 for these roads, and to execute bonds, (debentures,) or other securities for the payment thereof, is sustained by the very

words of the 226th section of the Municipal Institutions Act, and the resolution which the county council has adopted does not, as far as I can see, contravene any of the stipulations of that clause of the statute, but is rather in accordance with it. If the provincial government think proper to accept bonds or debentures without the passing of any by-law authorising their issue, or providing any rate or sinking fund for paying them off, they may do so; but the government would probably feel that it would be more satisfactory to have some special rate fixed by a by-law to be levied annually to pay the amount within a given period, which by-law could not afterwards be repealed until the debentures were paid.

Whether such a by-law could be passed without the assent of the ratepayers it is not necessary now to determine. The fact, however, that at the close of the first paragraph of the 226th section of the Municipal Act it is stated, that the by-laws to be passed under that section shall be valid, although no special or other rate per annum shall be settled or imposed to be levied in each year as provided by the three *last preceding sections* of the act, would seem to imply that section 224 did not extend to these by-laws. Only one of those sections, the 223rd, provides for the fixing of the annual or special rate: the 224th being the one which requires the submitting the by-law to the assent of the electors, when the debt to be contracted exceeds \$20,000, does not refer in any way to such rate, nor does the 225th section. If it was intended that the 223rd section should still apply to a by-law to be passed under the 226th, why is reference made to it at all as one of the *three preceding sections*? There is much room to argue that none of the three sections relating to by-laws for *creating debts* extend to by-laws made for the purchase of public works, except in the manner and to the extent pointed out in the second paragraph of the 226th section.

As to the Kingston road purchased by the municipality, extending into the county of Ontario about three-quarters of a mile, the statute, Con. Stat. Canada, cap. 28, sec. 76, authorising the sale of these works, specially provides that they may be sold to a municipal council, whether they be within the limits of the municipality or not.

Rule discharged.

THE QUEEN v. OUELLETTE.

Obstructing a highway—Insufficient evidence of dedication.

Where the defendant was convicted under an indictment charging him with having obstructed a "highway" on evidence, which, as reported to the court, did not shew that the alleged highway had been established by a plan filed or signed by the owners of the adjoining lots, or by the general user of the public, it having been used by one or two persons only for a short time, or that any clearly defined portion of land had been marked off and used; but there appeared to have been merely an open space not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, &c., to the rear of the premises:—

Held, that there was not sufficient evidence of dedication to support the conviction, which was, therefore, ordered to be quashed.

This was a special case reserved for the opinion of the court under Con. Stats. U. C. ch. 112.

The defendant was tried at the last fall assizes holden at Windsor, before Mr. Justice Hagarty, on an indictment charging him with having obstructed, by putting fences across it, a public highway in the said town of Windsor, leading from Ouillette street to Goyeau street.

At the trial, upon the close of the case for the crown, *J. O'Connor*, for the defendant, objected that it had failed, inasmuch as there had been no sufficient dedication or user of the alleged highway shewn. It was admitted that the obstruction complained of had been caused by the defendant, who claimed the right to have created it as owner or lessee of the *locus in quo* as part of lots five and ten, which it would be if not a highway as alleged.

It was agreed that a verdict of guilty should be recorded, and that the case should be reserved for the consideration of this court, the learned judge having felt doubts as to the legal existence as a road or highway of the land in question. It is unnecessary to insert the evidence given at the trial, which is sufficiently adverted to in the judgment of the court for a right understanding of the case.

Robert A. Harrison, for the Crown, cited *Belford v. Haynes*, 7 U. C. Q. B. 464; *Barracrough v. Johnson*, 8 A. & E. 99; *Poole v. Huskinson*, 10 M. & W. 827; *Regina v. Boulton*, 15 U. C. Q. B. 272; *Regina v. Spence*, 11 U. C. Q. B. 31; Con. Stats. U. C. ch. 112.

O'Connor, with him Scott, contra, cited Russell on Crimes, 3 ed., vol. I. 332, 338; *Rex v. Cumberworth*, 3. B & Ad. 108; *Rex v. Edgelane*, 4 A. & E. 723.

RICHARDS, C. J., delivered the judgment of the court.

If we are to consider the case as sent to us for our opinion as to whether the evidence is such that the jury ought to have found the defendant guilty, we are of opinion that the jury ought to have found the other way, and according to the *Queen v. Plunkett* (21 U. C. Q. B. 536,) the conviction out to be quashed. If, however, the case being reserved under the statute, we are to say if there is any evidence to go to the jury, we cannot say there is not some, but certainly it is of a very unsatisfactory character. In the cases referred to in the argument, particularly that of the *Queen v. Spence*, most of the modern cases on the subject of dedication are commented on, and looking at the principles to be deduced from those cases I fail to see satisfactory evidence that will sustain this conviction.

In what way was this supposed highway, extending as I understand about 75 or 100 feet in rear of these village lots, and then ending so as to form a *cul de sac*, established? Not by a plan filed by the owners of the adjacent land; for I do not understand that they all signed it: not by the general user of the public; for the use was very limited, and that by one or two persons only, and for a short period. There was no clear defined limit marked off and used. It was not defined by posts or marked off by fences, but, being an open space, the owners of the adjoining lots passed over that open space, which was much wider than any supposed dedicated lane or street, and used it in that way to carry goods, wood, &c., to the rear of the premises. The lot in question was at the time, as I understand, unoccupied, and the owner did not ever reside in Windsor. The owner was a brother of one of the witnesses, who had consented with other proprietors to this lane being established, and three of them had signed the plan shewing the lane. But the owner did not sign the plan: his brother said he, the witness, had promised the assent of his brother, the owner, and in giving a lease afterwards he had reserved the lane. The lease was said to

have been produced at the trial : it is not before us, and we cannot say what its effect may be. As far as any evidence reported to us goes, we think it not sufficient to justify the conviction. *Dawes v. Hawkins* (4 L. T. N. S. 288), is a late case in which there is some discussion as to dedication of land for a highway.

Conviction quashed.

HICKS V. GODFREY ET AL.

Bond to the sheriff—Notice to debtor to answer interrogatories within ten days—Assignment of bond—Pleading.

The declaration, after reciting that the plaintiff had recovered a judgment against one G. for a certain sum; that a writ of *ca. sa.* had been issued under said judgment, on which the said G. had been taken in execution and committed by the sheriff to close custody; that thereupon said G. and the other defendants gave bail to the said Sheriff, entering into a bond conditioned that said G. should observe and obey *all notices, orders, and rules of court, touching or concerning him said G., as his answering interrogatories, &c., &c.*;—assigned as a breach of the conditions of the said bond that, the said G. enjoying then the benefit of being released from confinement in close custody, the said plaintiff did duly file certain written interrogatories for the purpose, &c., and did cause a copy of the same to be served on said G., requiring him to file his answers under oath thereto *within ten days after the service thereof* * * * and, thereupon, it became the duty of said G. to file his said answers on oath *within the said time*; yet said G. did not file the said answers *within the said time*, although the time, &c., * * * by means whereof the said bond became forfeited, and thereupon the said sheriff did assign said bond to the plaintiff, pursuant to the statute, &c.

Held, on demurrer, that the declaration was bad; first, because there was no sufficient breach of the condition of the bond shewn, the only breach shewn being the omission to comply with the notice requiring the defendant to answer the interrogatories *within ten days*, which was not authorised by the statute; and secondly, that inasmuch as no sufficient breach of the bond was shewn, the sheriff had no authority to assign the bond, so as to enable the assignee to sue in his own name.

Semble, that the failure of the debtor to answer interrogatories, or to attend to be examined, upon notice therefor given by the plaintiff *of his own mere motion*, would not work a forfeiture of such bond: but that to work such forfeiture there must be a judge's order or rule of court requiring the debtor so to answer or attend.

The declaration stated that on the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and sixty-two, the plaintiff, by the judgment and consideration of this court, recovered against one Elisha Godfrey (who was also a defendant in the writ, but who, it was suggested, was beyond the jurisdiction of the court,) the sum of, &c., as well for his damages in, &c., as for his costs and charges, &c., by the court adjudged, &c., as by the

record of the said judgment, &c., and thereupon the said judgment remaining, &c., the plaintiff for having satisfaction, &c., duly caused to be issued out of the said court a writ of *ca. sa.* directed to &c., sheriff, &c., commanding the said sheriff that he should take the said Elisha Godfrey if he should be found in his the said sheriff's county and him safely keep, so that he the said sheriff might have the body of the said Elisha Godfrey before the justices, &c., to satisfy the said plaintiff the said monies in form aforesaid adjudged to the plaintiff, which writ was afterwards and while the same was in full force, on the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and sixty-two, delivered to the said sheriff, endorsed with a direction to the said sheriff to arrest and detain for the sum, &c., and the said sheriff did afterwards, on the fifth day of December, in the year of our Lord one thousand eight hundred and sixty-two, under and by virtue of the said writ, and the same being in full force, seize and take the said Elisha Godfrey by his body within the said county of Oxford, and had him in execution under the said writ, and confined in the jail of the said county of Oxford, and thereupon the said Elisha Godfrey, being entitled to give bail to the said sheriff, did produce the said other defendants to become such bail, and thereupon the said defendants, Elisha Godfrey, Joel McCarty and Nelson C. McCarty, by their bond or writing obligatory, sealed with their seals, and dated the day and year last aforesaid, acknowledge themselves to be held and firmly bound to the said sheriff in the sum of two hundred and seventy-five pounds of lawful money of Canada to be paid to the said sheriff, his certain attorney, executors, administrators or assigns, for which payment well and truly to be made the said defendants did bind themselves firmly by the said bond, and which bond was subjected to a condition thereunder written, whereby after reciting the premises aforesaid and that the said Elisha Godfrey was so arrested and confined it was declared, that if the said Elisha Godfrey should observe and obey all notice, orders and rules of court touching or concerning him, the said Elisha Godfrey, or his answering interrogatories, or his appearing to be examined *viva voce*, or otherwise, or his returning or being

*remanded to close custody, and if they, the said Joel McCarty and Nelson C. McCarty would produce the said Elisha Godfrey to the said sheriff, when they the said Joel McCarty and Nelson C. McCarty should be thereto required upon reasonable notice, and if the said defendants should within thirty days from the execution thereof cause and procure the said bail, or any other that might be substituted therefor, to be allowed by the judge of the county court of the county of Oxford, and such allowance to be endorsed on the said bond within the said thirty days, according to law, then the said bond should be void, otherwise the same should remain in full force and effect; and thereupon the said sheriff did permit and allow the said Elisha Godfrey to go out of close custody into and upon the jail limits. Breach, that the said bond being in full force, and the said Elisha Godfrey enjoying then the benefit of being relieved from confinement in close custody, he, the plaintiff, did duly file certain written interrogatories for the purpose of discovering property and effects which the said Elisha Godfrey might be possessed of or entitled to, or which might be in possession or under the control of some other person for the use or benefit of and said Elisha Godfrey, or which the said Elisha Godfrey having been in possession of, might have fraudulently disposed of to injure the plaintiff as such creditor, and touching the said Elisha Godfrey's estate and effects and the circumstances under which he contracted the said debt or incurred the said liability, and as to the means and expectations the defendant then had, and as to the disposal he may have made of any of his property, and did cause a copy of the said interrogatories to be served on the said Elisha Godfrey on the the fourth day February one thousand eight hundred and sixty three, together with a notice directed to the said Elisha Godfrey, requiring him to file his answers under oath to the said interrogatories *within ten days after the service thereof*, and that the said answer should be filed in the office of the deputy clerk of the crown in the county of Oxford, and that after the expiration of the said ten days an application would be made by the said plaintiff, that the said Elisha Godfrey might be recommitted to close custody in the said jail for the period of twelve months, the damages in the said*

action being for the seduction by the defendant, Elisha Godfrey, of the daughter of the plaintiff, and thereupon it became and was the duty of the said Elisha Godfrey to answer the said interrogatories on oath within the said time, and to cause the same to be filed and notice thereof given according to law ; yet the said Elisha Godfrey did not answer the said interrogatories, nor file nor give notice of any such answers, within the said time, although the time for so doing expired before the * agreement of the said bail thereafter to be mentioned, but on the contrary therein wholly failed and made default and absconded from this province, and had not since the giving of the said bond been in such close custody, by means whereof the said bond became forfeited ; and thereupon the said sheriff by his assignment under seal, endorsed on the said bond, and attested by one credible witness, did assign, transfer and set over to the plaintiff, pursuant to the statute in that behalf, the said bond, and all the said rights and causes of action which had accrued thereunder as aforesaid, and the plaintiff claimed, &c.

To this declaration the defendant demurred on the following grounds :

1st. That the said bond, being made since the fourth of May, A.D. 1859, was not given in pursuance of the statute in that behalf, and differed therefrom in not being a joint and several bond, and in being conditioned that the defendant should abide within the limits, and that the sureties as well as the debtor should procure the allowance of the said bond by the judge of the county court, and also varied therefrom in other respects, whereby the said bond was void, or at all events was not assignable by the sheriff to the plaintiff so that the plaintiff could sue thereon in his own name.

2nd. That it did not appear that the *ca. sa.* was legally issued by judge's order, or otherwise, as the statute required.

3rd. That the bond declared on was not assignable before breach, and no sufficient breach to warrant such assignment was shown.

4th. That it did not appear that there was any motion, order, or rule of court, touching or concerning the said debtor,

* Evidently intended for, *assignment of said bond.*

or his answering the interrogatories referred to, or any judge's order or other authority shewn to warrant the filing and serving of the said interrogatories; and as to the notice alleged to have been served upon the debtor to answer such interrogatories, it was not shewn that the same was signed by the said plaintiff, or his attorney, or any person authorised in that behalf, or that the interrogatories served were so signed, or that the same were filed and served while the debtor was enjoying the benefit of the limits; and, also, that ten days was not a sufficient time in law for answering the same, and that the said debtor was not bound to answer them or to file and give notice of such answers within that time; and that it was not averred that a rule or order was made, upon the debtor's default to answer the same, for his committal to close custody, or for his returning and being remanded thereto, nor that the said sureties were required upon reasonable or other notice to produce the said debtor to the sheriff.

J. A. Boyd, for the demurrer, cited Con. Stats. U. C., ch. 24, secs. 25, 29, 33, 35, ch. 26, sec. 7; 10 & 11 Vic., ch. 15, sec. 5; 16 Vic., ch. 175, secs. 7-12; 11 Geo. IV., ch. 3, sec. 10; 4 Wm. IV., ch. 10; *Kingan v. Hall*, 23 U. C. Q. B. 503; *Chitty's Precs.* I. 448; *Leonard v. McBride*, 3 O. S. 1; *Brown v. Paxton*, 19 U. C. Q. B. 434, per Robinson, C. J., 437, per McLean, J.; *Sinnott v. Peoples Prov. Ins. Co.* 9 Ir. C. L. Rs. 180; *Chitty's Arch. Pr.* 11 ed. 1710; *Tidd's Pr.* 8 ed. 487, 8; *Zouch v. Empsey*, 4 B. & Al. 522; *Meighan v. Reynolds*, 4 O. S. 19; *Hyde v. Barnhart*, *Draper's Rs.* 56; *Malone v. Handy*, 5 O. S. 310; *Hamilton v. Anderson*, 2 U. C. Q. B. 452; *Smith v. Foster*, 11 U. C. C. P. 161; *Whittier v. Hands*, 18 U. C. Q. B. 295.

D. G. Miller, contra.

RICHARDS, C. J., delivered the judgment of the court.

The alleged breach of the condition of the bond, which works the forfeiture of it, and authorises the plaintiff to take an assignment of it, under sec. 33 of the Con. Stat. of U. C., cap. 24, is this, that plaintiff served the defendant Godfrey with interrogatories, as provided by the 35th section of the

same statute, in connection with the 7th sec. of cap. 26, Con. Stats. of U. C., and gave notice that he required Godfrey to file his answers to them under oath *within ten days after the service*, and that after ten days an application would be made to recommit him for twelve months, as plaintiff's claim against him was for seduction of his daughter; that thereupon it became Godfrey's duty to answer the said interrogatories on oath *within the said time*, yet that he did not answer the said interrogatories, nor file or give notice thereof, *within the said time*, though the time for doing so had expired before "the assignment of the bond to the plaintiff." I suppose this is what was intended, but it does not read so in the copy I have. The plaintiff contends this is a breach of that part of the condition of the bond which provides that he (Godfrey) shall observe and obey *all notices*, orders, or rules of court touching or concerning him, said Godfrey, or his answering interrogatories, or his appearing to be examined *viva voce*, or otherwise, or his returning and being remanded into close custody.

The plaintiff contends that the defendant was bound to obey a notice given by the plaintiff without the intervention of the court in any way, and that having given him the notice requiring him to answer in *ten days*, Godfrey not having obeyed that notice, his bail are amerced in the amount of the debt.

These statutes, on the subject of insolvent debtors and arrest and imprisonment for debt, provide how debtors are to be interrogated or examined touching their affairs. According to the 35th section of cap. 23, the party at whose suit any debtor is confined may at any time, while the debtor enjoys the benefit of the limits, file and serve interrogatories to be answered by the debtor in the manner provided for in cap. 26; and in case the debtor neglects or omits for fifteen days next after service to answer and file the answers, and to give notice of such filing, the court or a judge may make a rule or order to commit the debtor to close custody, and the sheriff, on due notice of such rule or order, shall recommit him to close custody, until he gets a rule or order again admitting him to the limits. Section 41 permits a party to apply to have a debtor orally examined, and he may be so examined by order of a judge.

Under cap. 26, when an insolvent applies to be discharged from custody, or for weekly allowance, the plaintiff may file interrogatories, and until they are answered no order can be made granting him the weekly allowance, and under various provisions of the act a judge may allow further interrogatories.

The only section which permits the plaintiff of his own mere motion to file interrogatories and give notice, &c., is sec. 35 of cap. 24. When the defendant gives notice of an intention to apply under cap. 26, the plaintiff may file interrogatories, but for all other purposes he must get the leave or order of the court or a judge before taking these extraordinary proceedings. I do not think the legislature intended to extend the right of administering interrogatories by making the provision they did in the bail bond as to a defendant obeying orders, notices, &c., beyond what they had already done. The provisions on that subject seemed ample, and there was no apparent necessity for bestowing extraordinary powers on a plaintiff to harrass a defendant, beyond what had already been given to him. The plaintiff had a right to require the defendant to answer the interrogatories in *fifteen* days, under sec. 35 of cap. 24. If it be admitted that for the purpose of this proceeding to make the bail liable, that he had a right to file the interrogatories and give the notice that they must be answered in fifteen days, it will go beyond what in any other case I am yet prepared to admit. But he has not done that: he has by his notice required the interrogations to be answered in ten days. He has no authority in the statute for that: it is not pretended he was authorised by the court or a judge to give such a notice, and as the only default or breach of the condition of the bail bond suggested is the omission to answer the interrogatories within the ten days, I think the plaintiff's right to bring the action fails, and it fails on two grounds: first, there is no breach of the condition; and second, the sheriff has no authority to assign the bond, so as to enable the assignee to sue in his own name, until the happening of such breach.

Having decided this point in favor of the defendant, it will not be necessary to discuss the other points raised by Mr. Boyd in his very able argument. Our judgment will be for the defendant on the demurrer to the declaration.

The judgment of the learned chief justice of the court of Queen's Bench in the case of *Kingan v. Hall* refers to the different sections of the statute, ch. 24, Con. Stats. of Upper Canada, and shews the mode in which the previous acts have been consolidated, and the relation which the previous enactments bear to the present one, which has given us a more clear view of the statute. I may mention that individually I have a strong impression, that unless the interrogatories are administered by order of the court or judge, or a defendant is directed to appear to be examined by a similar order, a failure to answer or to attend to be examined would not be a breach of the bond.

Judgment for defendant on demurrer.

TWOHY V. ARMSTRONG.

Action for non-delivery of article contracted for—Plea, recovery of verdict by defendant in former suit for same cause of action.

The first count alleged that the defendant bargained and sold to the plaintiff, and the plaintiff bought of the defendant, a certain quantity of oats at a certain price per bushel, to be delivered by the defendant to the plaintiff within a reasonable time at the city of Toronto; and all conditions, &c., were fulfilled so as to entitle plaintiff to the delivery of the said oats, yet defendant did not deliver to plaintiff the said oats, whereby, &c.

The second count alleged an agreement between plaintiff and defendant, that plaintiff should buy of the defendant a certain quantity of *Canada* oats, and that defendant should deliver same to plaintiff at a certain place, yet defendant delivered to plaintiff as and for the said *Canada* oats the same quantity of a heterogeneous mixture of burnt wheat and oats, greatly inferior in value to *Canada* oats, and defendant never delivered to plaintiff the *Canada* oats, and that the mixture so delivered was wholly valueless to and unsaleable by plaintiff, &c., &c.

The defendant pleaded, that the oats mentioned in the first and second counts were one and the same lot of oats, and that theretofore, on the 18th August, 1864, in an action brought against the plaintiff for the recovery of the price of these same oats, in which the now plaintiff pleaded that the debt thereby claimed from him was contracted by and through the fraud of the now defendant, upon issue joined in said action, which involved the identical facts alleged as breaches of contract in the plaintiff's declaration in this action, a *verdict* was rendered for the now defendant.

Held, on demurrer, plea bad, as not alleging that *judgment* had been entered on the verdict.

Held, also, that the second count of the declaration was good.

First count—That the defendant bargained and sold to plaintiff, and plaintiff bought of the defendant two thousand three hundred and forty-eight bushels and seventeen pounds of oats, at the price of forty-eight cents per bushel

to be delivered by the defendant to the plaintiff within a reasonable time at and in a certain warehouse situate in the city of Toronto, known as the Woolley & Thurston's warehouse, and all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have such oats delivered as aforesaid; yet the defendant did not deliver to the plaintiff the said two thousand three hundred and forty-eight bushels and seventeen pounds of oats, whereby the plaintiff had been deprived of the said oats and of the profits which would have accrued to him from the delivery of the same.

Second count—That it was agreed by and between the plaintiff and the defendant that the plaintiff should buy of the defendant two thousand three hundred and forty-eight bushels and seventeen pounds of *Canada oats*, and that the defendant *should deliver the same* to the plaintiff at and in a certain warehouse situate in the city of Toronto known as Woolley & Thurston's warehouse, and all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to a delivery of the said two thousand three hundred and forty-eight bushels and seventeen pounds of *Canada oats* as aforesaid; yet the defendant delivered to the plaintiff in and at the said last mentioned warehouse, as and for the said two thousand three hundred and forty-eight bushels and seventeen pounds of *Canada oats*, the same number of bushels and pounds of a heterogeneous mixture of burnt wheat and oats greatly inferior in value to *Canada oats*, and the defendant never delivered to the plaintiff the said two thousand three hundred and forty-eight bushels and seventeen pounds of *Canada oats* in or at the said warehouse as above specified, or elsewhere, or any part thereof, in pursuance of the said agreement, and by reason of the premises the said mixture so delivered was wholly valueless to and unsaleable by the plaintiff, and the plaintiff incurred great expenses in storing and keeping the said mixture, and in endeavoring to sell the same at a reduced price, and the plaintiff has lost the price paid by him to the defendant for the same, and the profits which he would have derived from the performance of the said agreement.

Fourth plea, to the first and second counts, that the oats in the said counts respectively mentioned are one and the same lot of oats, and not other or different oats in the said respective counts, and that heretofore, to wit, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-four, the now defendant impleaded the now plaintiff in Her Majesty's court of Queen's Bench, at Toronto, to recover the price or value of the identical oats in the said first and second counts mentioned as having been bargained and agreed to be sold by the now defendant to the now plaintiff, and the now defendant declared in his said action (in order to recover the price of said oats as aforesaid,) for goods sold and delivered by the now defendant to the now plaintiff, and the now plaintiff pleaded to the declaration in said action that he never was indebted to the now defendant as in such declaration alleged, and as a second plea thereto that the debt thereby claimed from him was contracted by and through the fraud of the now defendant, and the now defendant joined issue on the said pleas of the now plaintiff in said action, and such proceedings were thereupon had that the record in the said action was duly entered for trial at the assizes in and for the united counties of York and Peel, held at the city of Toronto, on the tenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, and the issues so joined therein were thereupon duly brought on to be tried before a jury of the said united counties sworn to try the said issues, and at said trial evidence was offered, produced, and submitted to the said jury on behalf of the now plaintiff to shew, and whereby it was by him attempted to establish, as an answer to the now defendant's said action, the identical facts alleged as the breaches of contract in the said first and second counts respectively set out; and that the said jury, having duly weighed all the said evidence as well for the now plaintiff as the now defendant in said action, upon their oaths said that the now plaintiff was indebted to the now defendant for the said oats in the said first and second counts mentioned, sold and delivered by the now defendant to the now plaintiff, and that such debt was not contracted by or through the fraud of the now defendant, and they found and

delivered their verdict in said action on the merits of the case in favour of the now defendant for the sum of six hundred and thirty-two dollars and eight cents, being all that part of the price of the said oats unpaid to the now defendant, which said verdict is still in force.

Demurrer—That the said fourth plea is not an answer in law to the said first and second counts of the declaration in this, that the said verdict alleged in the fourth plea to have been obtained by the defendant against the plaintiff in a prior action *not having been followed by the judgment* of the Court of Queen's Bench cannot be pleaded in bar to the said first and second counts of the declaration: that the obtaining of such a verdict without being followed by such judgment does not constitute in law a defence to the causes of action in the said first and second counts mentioned: that it is not alleged or averred in the said fourth plea that any judgment was entered upon the said verdict, or that the defendant recovered any judgment whatever in the said prior action against the plaintiff.

The defendant joined in demurrer, and gave notice of the following exceptions to the second count of the declaration:

That the promise relied on in said count is to deliver certain goods agreed to be sold by defendant to plaintiff, and a delivery and acceptance of certain articles as and for the goods so sold is admitted and alleged, and the plaintiff cannot, therefore, recover under the contract set out as for non-delivery of said goods, nor for any supposed inferiority in quality or description of the articles so delivered: that if the breach of non-delivery be properly assigned the averment of delivery of some other goods than those contracted for is inconsistent, ambiguous, and inapplicable to the agreement relied on: that the allegation of delivery and acceptance of the articles mentioned as and for the goods sold is sufficient to prevent a recovery under the contract set out.

K. McKenzie, Q. C., for the demurrer, cited *B. & L.'s Precs.* on Pl. 2 ed. 213; *Wieller v. Schilizzi*, 17 C. B. 619; *Josling v. Kingsford*, 13 C. B. N. S. 447; *Vooght v. Winch*, 2 B. & Al. 662; *G. S. N. Co. v. Guillon*, 11 M. & W. 877; *Smith v. Nicholls*, 5 Bing. N. C. 208, 220; *Deacon v. G. W. R. Co.* 6 U. C. C. P. 241.

Robert A. Harrison, contra, cited, Plummer v. Woodburn, 4 B. & C. 625; Eastmure v. Laws, 5 Bing. N. C. 442, per Tindal, C. J., 451; Hancock v. Welsh, 1 Starkie, 347; Cleve v. Powell, 1 M. & Rob. 228; Tay. Ev. 2 ed. 1308.

RICHARDS, C. J., delivered the judgment of the court.

As to the exception to the second count of the declaration, I fail to see any force in the objection. According to the view put forth by the defendant, whenever there is delivered at a particular place what may be an inferior article to that which the defendant contracts to deliver, though plaintiff may not know at the time it is not of the quality he was to receive from the defendant, yet he is precluded from bringing an action against the defendant for the breach of his express or implied agreement to deliver an article of a particular quality. Mr. Harrison failed to refer us to any authority to support his proposition, and the declarations in the cases of *Weiler v. Schilizzi* (17 C. B. 619), and *Josling v. Kingsford* (13 C. B. N. S. 447), S. C. (7 L. T. N. S. 790), seem to be in substance like the count objected to. As to the objection in the plea mentioned came before the court, the judgment was not entered on the verdict we have in effect, if not in words, expressly decided the point raised, in *Gordon v. Robinson*,* before the court at the sittings for judgment after Trinity term last, and to that judgment we adhere.

SAME CASE.

On motion for a new trial, *Held*, that although defendant may not have contracted to deliver the best quality of oats, yet that, as much as the grain delivered was a mixture of oats and wheat, he had not fulfilled his contract to deliver oats; and, the jury found for the defendant, a new trial was granted, but only on payment of costs, as the amount of damages to which plaintiff appeared entitled was only about \$100.

This was the same case as the last. The issues in fact joined between the parties had been tried at the last January Assizes at Toronto, holden for the United Counties of York and Peel, before Mr. Justice John Wilson, when a verdict was found for the defendant.

K. McKenzie, Q.C., obtained a rule *nisi* upon the defendant to shew cause why a new trial should not be granted

* 14 U. C. C. P. 566.

on the ground that the verdict was contrary to evidence, the weight of evidence, and the Judge's charge.

Robert A. Harrison shewed cause.—He cited *M. R. Co. v. Bromley*, 17 C. B. 372; *Trew v. P. R. Ass. Co.*, 6 Jur. F. S. 759; *Parkinson v. Lee*, 2 Ea. 315; *Gardiner v. Gray*, 4 Camp. 144; *Power v. Barham*, 4 A. & E. 473; *Wieler v. Schilizzi*, 17 C. B. 619; *Nichol v. Godts*, 10 Ex. 191; *The Queen v. Chubbs*, 14 U. C. C. P. 32; *Bradford v. Manly*, 13 Mass. 138.

McKenzie, Q. C., contra, cited *Chanter v. Hopkins*, 4 M. & W. 404; *Young v. Cole*, 4 Scott, 489; *Bannerman v. White*, 10 C. B. N. S. 844; *Edgar v. Can. Oil Co.*, 23 U. C. Q. B. 333; *Gomperty v. Bartlett*, 2 E. & B. 849.

RICHARDS, C. J., delivered the judgment of the court.

As to the new trial, we think the evidence shews that defendant's agreement with plaintiff was to sell to him good oats, or good Canada oats. It is very clear that the commodity transferred to plaintiff was a mixture of oats and burnt wheat, not a mixture caused by accidental circumstances, if that would make any difference, nor produced by the ordinary growth of the article sold, either in consequence of bad culture or from want of care in gathering or cleaning it, as sometimes happens in the growth of grain or seeds. Here a merchant in the country, not the defendant however, had a quantity of oats, and he had also bought a quantity of wheat, which had been damaged by fire, and was considered of little value. It occurred to him that by mixing it with the oats he might be able to dispose of it to a profit. He accordingly mixed it with the oats, and a subsequent purchaser put in more oats, and in the end 2,348 bushels of this mixture, containing twenty per cent. of the burnt wheat, was delivered at a warehouse in this city for the plaintiff, on defendant's agreement to deliver him good oats or good Canada oats.

The evidence does not shew that any article compounded like this is known in commerce as good oats, or good Canada oats. It does not appear that the plaintiff was aware when the delivery order was handed to him that the commodity he was to receive under it was of the quality and mixture

which was shewn to him afterwards as that which had been owned by the defendant, and was held for him by the defendant's direction under that order.

Can it be said that defendant fulfilled his agreement and delivered to plaintiff 2,348 bushels of oats, when of the commodity delivered as oats five hundred and sixty-nine and three-fifths bushels were burnt wheat? I think not. If a portion had been oats of an inferior quality, or some other grain, or imperfectly formed grain, such as may grow with and is commonly mixed in its growth or culture with oats, then it might be said that plaintiff could not complain if this sort of imperfect grain made the quality of the oats less marketable, or reduced its value, because he did not protect himself by a stipulation that he was to have good marketable oats. But when the admixture is of a kind of grain generally much more valuable, but which having been injured by fire has apparently become much less valuable than oats, and is designedly mixed with the oats to dispose of it to better advantage, it would seem unreasonable to hold that any purchaser would be considered under the name of oats as purchasing such a mixture, or that it could be properly sold in the market under the name of oats. I do not for the purpose of deciding this case assume that defendant, when he made the bargain with plaintiff, was himself aware of the admixture which lessened the value of the article sold, but put the case simply on the ground that he did not deliver to the plaintiff the article which the latter bought, or, at all events, the quantity of the article he agreed to sell.

I think the case of *Josling v. Kingsford* (7 Law Times, N. S. 790,) is an authority for the plaintiff, and that *Wieller v. Schilizzi* (17 C. B. 619) also supports his view of the case.

The evidence as to the fact that defendant admitted that his bargain with the plaintiff was that he sold to him oats or good Canada oats seemed clear: there is no dispute as to what the article delivered was, and the difference in value between the commodity delivered and that which defendant sold to plaintiff was about five cents a bushel. In this view plaintiff's damages would exceed \$100, so that his case does

not come within the rule of the verdict being under £20, when there is no misdirection complained of. We think, under the law and the facts complained of at the trial, the plaintiff ought to have had a verdict, and would not hesitate under ordinary circumstances to grant a new trial; but the amount which he would probably, in the event of a new trial being granted, recover is so small, that we fear we may be doing him an injury to make his rule absolute. If, however, he desires it, he may take the rule absolute for a new trial on payment of costs.

Rule absolute for new trial on payment of costs.

REYNOLDS V. CORPORATION OF THE CITY OF TORONTO.

Lessee of market fees—Obstruction of market by tenant of Corporation.

Where the defendants leased to plaintiff the market fees of a wood market established in one of the public highways of the city, covenanting against their own interference, or that of any one by their license, with the collection of said fees, having upwards of twenty years previously passed a by-law, recognizing, with certain restrictions, the right to deposit materials for building purposes on the highways of the city, and subsequently demised certain premises adjoining the market to one M., who obstructed a portion the same with building materials,—in an action by the plaintiff against the defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market, *Held*, that such action was not maintainable; that the by-law was one which the defendants had authority with a view to public improvement and convenience to pass, and that the plaintiff must be taken to have been cognizant of it when he became their tenant; that M. might, without the license of the defendants, have occupied a reasonable portion of the highway, the by-law apparently merely restricting, without expressly conferring, the right of occupation; that the market being fixed on a public highway, which is *prima facie* for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway; that there was no such implied covenant for quiet enjoyment as the plaintiff asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he claimed was secured to him.

This action was brought for an alleged injury to the plaintiff's market rights, which he held by lease from the defendants.

The declaration stated that the defendants, by deed, leased to the plaintiff the fees, tolls, dues and duties derivable, under and by virtue of the laws and regulations of the defendants, to have, hold, receive, take and enjoy the same for one year from the 25th of April, 1863, at a certain rent;

and that the defendants covenanted that, the plaintiff paying the rent, &c., they the defendants would not, nor would and person or persons on there behalf, interfere in any way whatsoever with the collecting, exactment, or receiving of the said fees, tolls, dues, and duties. The plaintiff then averred that the market was established and located on Front streets and extended along the northern side of Front street east of Church street, and the persons leasing the market had been and were accustomed, in accordance with the by-laws and regulations of the Corporation, to expose wood for sale therein, and for that purpose to place there wagons and other vehicles containing wood along the north side of Front street aforesaid, within the said market, paying to the defendant or other persons entitled, and (after the said lease) to the plaintiff, as such lessor thereof, the usual and accustomed market fees thereof according to law; and that after the lease the plaintiff was entitled thereunder to exact, collect, and receive the said fees, tolls, dues and duties, in respect of the use of the said market, along the north side of Front street, and all conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain the action; yet after the making of the lease, and during the term, Alexander Manning, then lawfully claiming the right, through and under the defendants, and by their license and permission, did obstruct, use, and occupy that portion of the market extending along the north side of Front street, and placed therein large quantities of brick and building materials, and used and has hitherto continued to use the same as a place of deposit therefor, and ejected and removed therefrom all persons frequenting the said market with wagons and which contained their wood for sale therein, whereby the plaintiff was interfered with and prevented by the defendants, and those claiming under them or on their behalf, from collecting, exacting, and receiving or making, during all the time aforesaid, all or every of the said fees, tolls, dues and duties derivable from that portion of the said market on the north side of Front street, as established at the time of the making of the lease, and lost and was deprived of divers large sums of money and income, which he would otherwise have derived from the said market.

The second count was in case, and alleged it to have been the defendants' duty after the making of the lease to have maintained and preserved the market as then established, and not to abridge or obstruct, or cause or permit the same to be abridged or obstructed, so as to interfere with the selling of wood therein to the prejudice of the plaintiff as lessee; and it therein averred that the defendants, not regarding their duty, did not maintain and preserve the wood market nor permit the same to be maintained during the said year as then established, but during that term wrongfully and injuriously permitted, licensed, and allowed one Alexander Manning (to whom the defendants had leased certain lots abutting upon and adjoining the market for the purpose of building thereon) to deposit on and upon the market large quantities of brick and other building materials, &c., whereby the market was much abridged and obstructed, &c., and divers persons desirous of selling wood therein were thereby expelled and prevented from entering the same with their wagons, &c.; and thereby the fees, &c., so leased to the plaintiff, became much diminished to the plaintiff's damage of £250.

The defendants pleaded, to the first count, that the deed mentioned was not their deed, and a traverse of the license; and to the second count, Not guilty.

The cause was tried at the Assizes held last fall for the Counties of York and Peel, then a verdict was rendered for the plaintiff and £125 damages.

The leases to the plaintiff and to Manning were proved and also the market by-laws of the city; and an extract from a general city by-law, passed on the 11th of October, 1841, in the following words: "No person shall place any timber, stone, or any other material for building, on any sidewalks; and when buildings are being erected on any street, no person shall be allowed to occupy more than one-third of the street, and when two buildings are being erected opposite each other, not more than one-third of the street each, with any such materials; and no person shall place any such stone, timber, or any such materials, in such manner as to obstruct the free passage of water in the gutters or surface drains; and no person shall suffer or permit any such stone,

lumber, or other materials, to remain on the street any longer than is absolutely necessary for the erection of the building for which such stone, lumber, or other materials, is or are designed."

The lease to Manning is dated the 22nd of January, 1864, and is for twenty-one years from the 1st of October, 1863, and by it the lessee, among other conditions, is bound to erect a stone or brick house of three stories in height on each of the six lots demised to him, on or before the 1st of January, 1865.

There was evidence given of damage sustained sufficient, perhaps, to support the verdict, if the plaintiff could maintain his action at all—there having been no license whatever given by the defendants to Manning to do the acts complained of further than was to be inferred from the section of by-law above stated—nor any act of interference by or on the part of the defendants, or of any of their officers or servants, with the market or with the fees, excepting the acts of Manning before mentioned which he claimed to be entitled to exercise under the by-law. The defendants' counsel had leave reserved to him to move to have a nonsuit entered, in case the court should be of opinion that there was not evidence in law to sustain the action.

In Michaelmas term last. *J. McBride*, for the defendant, obtained a rule upon the plaintiff to show cause why a nonsuit should not be entered, because the alleged license to Manning was under a by-law passed long before the commencement of this suit, and the plaintiff must be presumed to have taken his lease subject to the by-law and with full knowledge thereof;

2. Because no license from the defendant was proved;

3. Because the license (if any) should have been under sale;

4. Because the plaintiff's cause of action was in the nature of an eviction, and no such eviction was proved, for he did not cease to collect the market fees at any time during the lease.

The rule also asked for a new trial for the misdirection of the learned Judge in admitting secondary evidence of the by-law of which the above is an extract.

Robert A. Harrison shewed cause.—There is an implied engagement by the landlord that his tenant shall quietly enjoy: *Woodf. L. & T.* 508 2nd edn.; *Smart v. Stuart*, Rob. & Har. Dig. "Lease" I. pt. 1; *Small v. Pennell*, 31 Maine 267; *Davis v. Pettit*, 6 Law Rep. (Boston) 349; *Bandy v. Cartwright*, 8 Exch. 913; *Forsaith v. Clark*, 1 Foster Rs. (N. H.) 409.

McBride in support of the rule—There was no license of any kind to Manning proved. The by-law is not a license; but if so, it is one to which the plaintiff as a citizen is a party, and to which his lease was subject, and against which, therefore, he cannot complain. The alleged license should have been under the corporate seal: *Wood v. Leadbitter*, 13 M. & W. 838; *Grant on Corps.* 101.

A. WILSON, J., delivered the judgment of the court.

We do not think it necessary to refer to that part of the rule, or to the argument, relating to the new trial, for we think there was no misdirection, and that secondary evidence of the by-law was properly admitted. The questions are, whether there has been any breach by the defendants of their implied engagement that the plaintiff, as their tenant, should quietly receive and collect the fees of the market, and should not be disturbed in his enjoyment of the rights and privileges of the market; or whether there has been any breach of duty on *their* part by what Manning has done or has claimed to do under the sanction of the by-law. If there have been, the plaintiff should be entitled to recover; if there have not been, a nonsuit must be ordered to be entered.

The by-law referred to is one which the corporation had authority to pass. It would be impossible that the business of the city could be conducted without obstructing more or less in extent, and character, and for a longer or shorter period of time, the different streets and highways of the municipality: such necessary and reasonable obstructions, although they are obstructions, are not nevertheless acts of nuisance: if any different rule prevailed, the city could not be cleansed from sewage, or supplied with gas or water, because the breaking up of the streets necessary for such works would obstruct the travelling upon them and the

convenience of the public ; neither could they be graded, paved, or improved in any way, because the materials for such purposes and the operations necessary to carry them on would temporarily be a hindrance to the public. The public or a portion of it must submit at times to some inconvenience for the general welfare : accordingly it was held in *The Governor and Company of the British Cast Plate Manufacturers v. Meredith*, (4 T. R. 794), that where commissioners had power by statute to alter the level of the streets, and in the course of their duty, but not exceeding it, they had raised the entrance under an archway which led into the plaintiff's premises, by reason of which they had sustained injury, they were not entitled to maintain an action against the commissioners for such damage. Lord Kenyon, C. J., said : " If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. * * * Some individuals suffer an inconvenience under all these acts of parliament, but the interests of individuals must give way to the accommodation of the public."

In this case, it is true, the commissioners were performing a public duty, and not for their individual benefit, and so far it is distinguishable from the present case, where Manning was acting for his own private advantage ; but this is one of many cases where the individual benefit is also the public advantage. *Trade* is beneficial to the commonwealth : *farming* is said to be for the public advantage : *building* of houses is unquestionably so. Manning, the lessee of the premises fronting on this public street, which was also used as a wood market, might probably, without the license of the corporation, have laid his materials for building upon a reasonable part of the street and for a reasonable length of time, and all that the by-law appears to do is to prohibit any one in building from occupying more than one-third of the street, or to specify or restrict the space to be so occupied, without giving any express power to make such an occupation, assuming that such a power already existed, and did not require to be conceded : this by-law had been in operation for more than twenty years before the plaintiff obtained his lease.

Now this highway is *prima facie* for purposes of public travel, and if converted into any other purpose, such purpose must be subordinate to its primary and principal one, it cannot be in exclusion of it. This market could not be so exercised as to shut the public out from the use of the highway; nor to prevent any occupant on the street from driving up opposite to his door, and there loading or unloading any articles necessary for his use or trade; or from driving his carriage up and alighting on the sidewalk; or from keeping his carriage there for a reasonable time until he was ready to drive away again. Nor, in like manner, can I see how the lessee of such a right could prevent an owner or lessee of property there from laying down materials necessary for the purpose of repairing his house; and if so, then why not to build him a house?

Suppose any adjoining owner had a wagon necessarily standing opposite to his door for his ordinary lawful business, could this plaintiff, as the lessee of the market, or could the defendants themselves, have ordered the wagon away, for the purpose of letting in a wagon load of wood to stand there until the wood was sold? We think it would be a most unreasonable state of the law if this were so, and that the mere statement of the case supplies its own answer.

Mr. Mauning had either the right to use a portion of the highway as he did either by the common law or by the by-law. It may not be quite clear how far the corporation had the right to create this market in the public highway for stationary wagons during nearly the whole period of daylight: probably it had such a power; but if so, it must be subordinate to other higher and more indisputable rights. The plaintiff, therefore, when he took his lease, either took it against the public and private easements and privileges, in, over, and upon it, in which case his lease is inoperative, or he took it subject to them, in which case he cannot complain.

The plaintiff was bound to take notice at his peril of the by-laws of the corporation within whose limits he was exercising his business. *Butchers Company v. Bullock*, (3 B. & P. 434.) We do not say that notwithstanding this condition of things the corporation might not by express and positive terms have bound themselves that at no time should

the plaintiff be prevented by the exercise of any public or private rights whatever in or upon the highway, from having as many wagons and vehicles for the sale of wood within these limits as the space allotted for the market was reasonably capable of containing, and so made themselves responsible to the plaintiff for any loss or damage which he might sustain by reason of the exercise of any such rights to his prejudice as lessee of the tolls.

But such is not this case: the plaintiff seeks to make the defendants liable; firstly, on an implied covenant for quiet enjoyment, when there could in the nature of things on this highway be no such absolute and exclusive enjoyment as he claims it secured to him, and this both as to the public and as to individuals he well knew when he took his lease; and secondly, upon an alleged breach of duty on their part upon substantially the same facts; and in both views of his case he alleges that the obstruction complained of was done by the leave and license of the defendants.

Now this cannot be said to have been the case: they gave no such leave as he alleges; they passed a by-law on the subject which they had the power to pass: they made a lease to Manning which they had a right to make: they gave Manning no special license to deposit his building materials upon this ground; but Manning, in like manner as the plaintiff himself might have done, if he had been an owner or a lessee, placed his building materials on the street, and this he did, perhaps, by virtue of the by-law, or perhaps in ignorance of, and without regard to, it. We don't think that these facts sustain either the issue of license upon the first count, or the alleged duty or breach of duty traversed in the second count.

We do not say what the plaintiff might have done, or what the defendants, if actual injury were really sustained, ought to have done on the question of rent under the circumstances, for we have not given the matter any consideration: we have only expressed our opinion that according to the facts of this case no such claim as the plaintiff has set forth in his declaration has been proved.

The cases of *Upton v. Townsend* (17 C. B. 30;) *Smith v. Raleigh* (3 Camp. 513) may show how far acts of interference

by the landlord had been held to amount to an eviction in the case of corporation property.

The rule will, therefore, be absolute for a nonsuit.

Rule absolute for nonsuit.

See *Vochell v. Dancastell*, F. Moore, 891.

SQUIRE QUI TAM V. WILSON.

Property qualification of Justices of the Peace—Con. Stats. C. ch. 100, sec. 3
—Conflicting evidence—Judge's charge.

In a *qui tam* action against defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises, on which defendant qualified, was vague, speculative, and inconclusive, one of the witnesses, in fact, having afterwards recalled his testimony as to the value of a portion of the premises and placed a higher estimate upon it; while the evidence tendered by the defendant was positive, and based upon tangible data:—

Held, A. Wilson, J., dissentiente, that the jury were rightly directed, "that they ought to be fully satisfied as to the value of the defendant's property before finding for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant."

Observations on the principle of the valuation of land with a view to determining the property qualification of Justices of the Peace.

This was a *qui tam* action against the defendant for acting as a Justice of the Peace in and for the United Counties of Huron and Bruce without being qualified, according to "The Act respecting the qualification of Justices of the Peace," Con. Stats. C. cap. 100.

The declaration contained eleven counts.

The defendant pleaded not guilty to all, and, as to ten counts, an action *qui tam* pending against defendant at the suit of one David Paulin.

The plaintiff joined issue on the first plea, and replied to the second that the action of Paulin was commenced and prosecuted by fraud and collusion between Paulin and the defendant.

On this replication the defendant joined issue.

The cause was tried before Hagarty, J., at the last assizes held at Goderich, and a verdict found for the defendant.

In Michaelmas Term last, *Robert A. Harrison* obtained a rule *nisi* to set aside the verdict and for a new trial on the

grounds of misdirection in this, that the learned judge told the jury that if there was any doubt as to the sufficiency of the defendant's property qualification as a Justice of the Peace, to give him the benefit of the doubt; and for non-direction in this, that the judge refused to tell the jury that by law the onus of proving a sufficient qualification was cast upon the defendant, and that if the jury doubted as to its sufficiency the verdict should be against the defendant; and upon grounds of improper rejection of evidence in this, that he refused to hear the testimony of Charles A. Harte, a witness called on the part of the plaintiff; and on grounds of surprise, and grounds disclosed in affidavits and papers filed.

During the present term, *C. Robinson, Q. C.*, shewed cause.—There is no reason for complaining of non-direction, for the presumption is always in favour of the good faith of a public officer. Before acting the defendant had to make oath that his property was worth \$1,200. This he did, and he has proved by two witnesses that the property is of this value. It is true that the plaintiff produced as many and more witnesses to prove that in their opinion it was worth less, but they had not seen the property so fully as to be able to estimate its value, and after all it was but their opinion. It is true, too, that the statute requires the property qualification to be \$1,000, but it is easy to get witnesses honestly to undervalue property, and thus cast a doubt upon its value; but a doubt thus cast should be in favour of the defendant, because the presumption always is that a man is acting rightly, not wrongfully.

As to the rejection of the evidence of Harte, it must be admitted that his knowledge of the circumstances as to which he was called to speak was derived from the defendant during the relationship of attorney and client, and the evidence was, therefore, properly rejected. As to the affidavits filed by the plaintiff, they disclose no new facts, but a repetition of opinions of value, which are met by affidavits on the part of the defendant representing its value to be \$1,200. There is no surprise, and no ground on which a new trial ought to be asked for or granted, for the defendant was the owner in fee of the land.

On the question of misdirection he referred to *Con. Stats. Canada*, ch. 100, secs. 3, 6; on the alledged non-direction to *Great Western Railway Company of Canada v. Braid*, 8 L. T. N. S. 31, S. C. 9 Jur. N. S. 339; *Taylor v. Ashton*, 11 M. & W. 401, 417; *Taylor on Ev.* 4 ed. 366-369; *Conell v. Cheney*, 1 U. C. R. 307; and as to the surprise, *McLellan g. t. v. Brown*, 12 C. P. 542.

Harrison, in support of the rule, animadverted upon that part of the judge's charge, wherein he directed the jury not to weigh in scales too nicely balanced the value of the defendant's property. He argued that the statute required the qualification to be \$1,200, and that the legal presumption was against the defendant if doubt was thrown upon its value; for he was bound without reasonable doubt to have property of the clear value of \$1,200, and the whole onus of proving this lay on the defendant. He cited *The Lexington F. L. & M. Ins. Co. v. Paver*, 16 Ohio, 324; *Best on Presumptions*, 29, 57.

J. WILSON, J.—The 6th sec. of the *Con. Stats. C.*, cap. 100, enacts that "the proof of his qualification shall be upon the person against whom the suit is brought." The defendant in answer to the plaintiff's charge, that he had acted without the proper qualification, put in his oath of qualification, dated 17th of April, 1861, on certain property in Clinton, described therein. He called the person from whom he purchased the property in January, 1855, who proved that the defendant had then paid for it \$1,200 and had since expended \$400 more upon it, and that it was worth as much at the time of trial as it was when he purchased it. He proved by another witness who had opportunities of examining it, that the lot on which the house stood was an eighth part of an acre, and was worth at least \$1,200; that an adjoining lot of double the size, but with a house worth \$400 less than the defendant's, had been sold for \$1,600 within three months.

To displace this evidence, the plaintiff called three witnesses to speak to the value of the property. The first was the assessor for the years 1859, '60. and '61. He said that he had assessed its yearly value in 1861 at \$36, representing an

absolute value of \$600, which he said was a fair value the lot is over forty feet front by two chains deep, and might be now worth \$200 or \$300, and the buildings might have cost \$500 or \$600, but are not worth what they cost: he was never inside the house, and had never examined it, with a view to value it, for three years. The next witness said he thought the property worth \$700 to \$800: he had been inside the house, but never up stairs; but he admitted he had never looked at it with a view to value, for he did not expect to be asked. The third and last witness said that before the repairs he thought it worth about \$600, but he had not seen it since the repairs; he should not like to give \$900 now: some might give more, and, perhaps, if he had examined it through, he might value it at more.

The learned Judge reports to us that he directed the jury, "that they ought to be fully satisfied as to the value of the defendant's property before finding a verdict for the plaintiff; that he thought they should not weigh the matter in scales too nicely balanced: and that any reasonable doubt should be in favour of the defendant."

The last part of this charge is what is complained of in the rule; but in the argument the mode in which the jury were directed to weigh the matter was insisted upon as objectionable.

In both respects we think the charge was right. This is the first time that any question has arisen as to the valuation of property in view of this "Act respecting the qualification of Justice of the Peace"; and it would be desirable if some principle of valuation could be laid down for the guidance of those who act, and those who may have reasons of complaint, under it. It is for the most part a consolidation of the 6th Vic., cap. 3, which in the preamble recites that "as well by the criminal laws of England in force in this province as by divers provincial acts, Justices of the Peace are invested with great powers and authority, therefore it has become of the utmost consequence to all classes of Her Majesty's subjects that none but persons well qualified should be permitted to act as Justices of the Peace, and that the laws now in force in this province are insufficient for this purpose." It enacted, as the act before us does, that all

Justices of the Peace shall be of the most efficient persons dwelling in the districts and counties respectively; and further, that no person shall be a Justice of the Peace, or act as such, who has not real estate, of the description mentioned in the act, of or beyond the value of \$1,200 over and above what will discharge all incumbrances affecting the same, &c. The object of the act was two-fold; first, that the Justices should be of the most sufficient persons; and secondly, that they should be worth unencumbered real estate to the value of \$1,200 at least, to satisfy any one who should be wronged by their proceedings. Then, that Justices might be deterred from acting, the right is given to any person to sue *qui tam* and recover a penalty of \$100 for each offence against him who acts as a Justice without qualification, or without having taken and subscribed the oath of qualification set forth in the act. The present action is for ten such offences, and the point raised by this rule is, what is sufficient proof of this qualification, and in case the evidence of value be doubtful, which party is to have the benefit of the doubt. That the price paid for land and the money expended upon it, do not constitute its value, is a matter of every day's experience. We incline to think its value depends much upon the number of persons who at the moment are willing to purchase, coupled with the unwillingness of the owner to sell, and in a less degree by the amount of capital held for investment in land at the time. The anxiety of the owner to sell, when few are willing to buy, frequently reduces it to a value more nominal than real. Strictly speaking, the value of land, like any other commodity, is the price it will bring in the market at the time it is offered for sale; but to apply this rule to land in this country would be manifestly unjust, for there would be found times when no one would be willing to buy at any price, and for the simple reason that capital is not, and land always is, abundant in the market.

The defendant's oath of qualification was put in, and if evidence at all, it was evidence of value in his estimation; but in judging of the value a man sets upon his own property, especially if it be his home, we cannot weigh his opinion of it in "scales too nicely balanced." It may have

acquired value in his estimation from its associations, or, it may be, from the pains he has bestowed upon it to make it conformable to his ideas of elegance, or fitness, or comfort; or he may value it from the very preciousness which ownership and possession give to the house and home of most men.

Nor can we weigh the estimates of strangers as to the value of a man's house and land in scales more nicely balanced; for, allowing all credence to the honesty of those who give their opinions, they must be more or less speculative, according to the stand-point of view from which they are taken. The evidence for the plaintiff here affords an illustration. He calls the assessor for the years 1859, '60 and '61. In this last year the oath of qualification had been made. This witness, we have just seen, assessed its yearly value at \$36, thus representing its actual value at \$600. At present he says it may be worth \$300 more, but he had never been inside the house at all; and yet the yearly value of a house, as well as its absolute value, must in a considerable degree depend upon its internal appearance and finish. Nor does he say how it is that it is worth more now than in 1861; but in this country property out of business situations will seldom rent to pay six per cent. of its value.

Another witness values it at \$700 to \$800; but he had never been up stairs and never had looked at it with a view to its value. Another says it was, he thinks, worth \$600, before it was repaired, but he has not seen it since; he should not, however, like to give over \$900 now for it, although some might give more. If these estimates of value by the witnesses for the plaintiff were weighed in scales nicely balanced, there could be but indefinite justice. No proper valuation can be made of a house without seeing it inside; for some men disregard the exterior, who are lavish of internal value, and *vice versa*; and what one or another would give as speculative amounts cannot be a safe rule of value, unless they have examined the property, or are intending purchasers. The defendant's witnesses represent the value of it to be \$1,200 or more on given data, and on a reasonable knowledge of what the property was. If the

plaintiff had met this by data more definite, by a comparison of the value of land in the immediate neighborhood, or by a detailed estimate of the value of the buildings and their state of repair, external and internal, there might have been ground for finding fault with the direction; but when the evidence is vague, where it might have been more definite, we think the learned judge laid down the only rule which was safe, at least under the circumstances of the case.

In the affidavits before us on this motion, for and against it, the same differences of opinion exist. One witness who for the plaintiff had sworn, he would build now just such a house for \$450, in an affidavit for the defendant corrects this and says, he could not do it for less than \$600. We infer he had omitted to take into consideration the value of the verandah. On the one side they represent it worth \$1,200, on the other as of less value.

Then as to the express misdirection, "that any reasonable doubt as to the value should be in favor of the defendant." When the defendant had made a *prima facie* case, sustaining his oath, his conduct, his obedience to an act of the legislature, by evidence based upon tangible data; and when the plaintiff threw a doubt upon it, by evidence of speculative opinion, without given data, and without that knowledge of the thing valued; without laying down any rule of general application, we can safely say, that under all the circumstances of this case the learned judge was right in his direction. The plaintiff undertook to make out that the defendant had been guilty of dereliction of duty, if not of positive crime; but the presumption is always in favor of right acting, rather than of wrong doing.

The grounds for a new trial, on the score of surprise, we need hardly discuss: the plaintiff supposed the defendant's estate was a leasehold, which the latter answers by producing under oath his conveyance in fee. On the whole we think the plaintiff's rule should be discharged.

A. WILSON, J.—It is reported that the learned judge at the trial directed the jury that "they ought to be fully satisfied as to the value of the defendant's property before they

found a verdict for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The first part of the charge I understand to mean, that the jury should be fully satisfied that the value of the property *was not* what the defendant represented it to be, before they should find a verdict against him.

The statute provides, "that no person (except when otherwise provided for by law,) shall be a Justice of the Peace, or act as such, who had not in his actual possession, to and for his own proper use and benefit, a real estate, &c., of or about the value of \$1,200 over and above what will satisfy and discharge all incumbrances;" and the act further provides, that in any action, suit, or information brought against a person for acting as a Justice of the Peace, not being so properly qualified, "the proof of his qualification shall be upon the person against whom the writ is brought."

The evidence in this case was contradictory. The evidence given by the plaintiff's witnesses was, that the property was worth \$700 or \$800, and that given by the defendant's witnesses, that it was worth \$1,200.

I think the effect of the charge was, that the plaintiff had failed to sustain his case, because the jury might assume he had not successfully impeached the correctness of the defendant's valuation; instead of directing the jury that if the defendant had not satisfactorily made out that he did possess the necessary qualification they should find against him, because the law has cast upon him the burden of exonerating himself by proving affirmatively, as he was the proper person to do it, and one who could best do so, his own qualification.

As I think there was a misdirection I think there should be a new trial, and this may be ordered for such a cause in a penal action. Whether it should be attended with a different result or any other charge which might be given, it is for the plaintiff to consider.

RICHARDS, C. J., concurred with J. Wilson, J.

Rule discharged.

WHITE ET AL. V. BAKER.

Promissory notes payable in American currency—Plea, tender before action brought of smaller amount in Canada currency, alleged to have been at time of tender equal to plaintiff's claim—Demurrer.

To the first and second counts of a declaration on two promissory notes dated respectively 11th September and 29th November, 1860, for the respective sums of \$500 24 and \$388 85, payable six months after date, the defendant pleaded that the notes were signed and entered into in the State of Illinois, one of the United States of America, to be paid when due in United States currency, and alleged a tender by defendant before action of \$606 12 of lawful money of Canada, which was *at the time last aforesaid* equal to plaintiffs' claim, and a refusal by plaintiffs to accept same.

Held, on demurrer, plea bad; firstly, for alleging the amount tendered to have been equal to the plaintiffs' claim on the day of tender, before action brought, instead of at the time of making the notes sued upon, with subsequent interest, &c.; and, secondly, for alleging that the amount tendered was equal to *plaintiffs' claim*, instead of "equal in value to a certain sum of the currency of the United States," &c.; though, *semble*, this might be only ground of special demurrer.

This was a demurrer to the first plea, which was pleaded to the first and second counts of the declaration.

The first count set out, that on the 11th September, 1860 the defendant, by his promissory note, promised to pay to the order of the plaintiffs \$500 24, six months after date, but that he did not pay the same.

The second count was on a promissory note of the 29th October, 1860, for \$388 75, similar to the note in the first count in other respects.

The plea was, that the promissory notes were signed and entered into by the defendant in the State of Illinois, one of the United States of America, to be paid when due in United States currency; and that before the commencement of this suit, to wit, on the 23rd November, 1864, the defendant tendered to the plaintiffs the sum of \$606 12 of lawful money of Canada, which was at the time last aforesaid equal to the plaintiff's claim in the first and second counts mentioned, and that the plaintiffs refused to accept it; and that the defendant brought the same into court, &c.

The plaintiffs' grounds of demurrer were, that the sum tendered was a smaller sum than their claim; that it was not alleged to have been equal in value to the monies in the first and second counts mentioned, at the time when they became payable; that no excuse was assigned nor non-payment of the monies when they became due, uot were any damages tendered for such non-payment.

C. S. Patterson, for the demurrer, referred to *The Niagara Falls International Bridge Company et al. v. The Great Western Railway Company*, 22 U. C. Q. B. 592; *Crawford v. Beard*, 13 U. C. C. P. 35; *Judson Griffin*, 13 U. C. C. P. 350.

S. Richards Q. C., contra, referred to *Hutton v. Ward*, 15 Q. B. 26; *Westlake on Private International Law*, s. 232, as establishing that the plaintiffs were only entitled to recover the rate of exchange between the two countries at the time of the commencement of the suit, and not at the time when the notes became payable.

A. WILSON, J., delivered the judgment of the court.

It is not disputed that the *place* of payment is in Illinois, where these notes were made and delivered, and that the rate of exchange must be governed by the rate prevailing between the *forum*, in which the suit is brought, and the place where the money is to be transmitted; but it is contended that this rate is to be determined by that which prevailed at the time when the suit was brought, and not at the time when the money became payable.

In the passage cited from *Westlake* it is stated: "But what if the question of place becomes complicated with one of time, by a variation of the rate of exchange between the date when the debt fell due and that when the action is brought? It is the latter period at which the exchange must be taken; for the only fixed element is the amount owing in the place where the debt is payable, increased of course from time to time by such interest as may there accrue upon it. What is due elsewhere fluctuates from *forum* to *forum*, and from moment to moment, being always the sum which on being remitted will produce that amount."

The assertion (for it is not reasoning), that there is "a fixed element of amount in the place where the debt is payable," is not correct, so long as it is claimed to be paid in a foreign currency, or, in other words, so long as it is subject to the laws of exchange; but even if there be such a fixed element of amount at the place of payment, how can that apply more to the time of the suit than to the time of the payment?

If this had been a bill of exchange instead of a promissory note, the application of the rule of exchange to the time of the dishonor would have been more obvious.

Suppose, then, instead of this note, the plaintiffs, residing in Illinois, had drawn a bill upon the defendant in Canada payable in Illinois, and he had accepted it: when that bill fell due and was dishonored, the plaintiffs, according to the Law Merchant, would have been at liberty to redraw upon the acceptor for the amount he ought at the time of the dishonor of the bill to have paid to the drawers or holder, together with the expenses and any additional exchange which was then prevailing between the two places. Why does not the same rule apply to a note as to a bill? The payee of a note relies upon the punctuality of the maker to redeem the paper, which the payee has probably negotiated; and if the maker do not redeem it, the payee in such a case must; and if he do, why should he not get from the maker the money which he, the payee, has been obliged to pay, and which the maker ought to have paid? Why, if the payee has paid \$500, which was the whole claim on the note when it fell due, is he to recover what would at the time of his own payment be equal to \$700, because one year after, when he brought his suit in a foreign country, his own currency had risen in value? Or why should the maker avoid paying the full \$500, because the currency had in the mean time of his own neglect fallen? There is no reason why the one should thus gain, and the other should thus lose: they both contracted with relation to a particular time, which was the maturity of the note, and that, we think, must govern. Story's Conflict of Laws (ss. 309, 310, 311), and *Suse v. Pompe* (8 C. B. N.S. 538), are full authorities for this opinion.

The plea is, however, open to objection, in alleging that \$606 12 of lawful money of Canada was equal to the plaintiffs' claim; for their claim is really a question of law, to be determined by many considerations, and this jury cannot try; but they could try whether \$606 12 of the money of Canada was equal in value to a certain other sum of the currency of the United States; and this is the mode in which

it should have been alleged. It is very likely that this is only cause of special demurrer in this view of it; but in setting up the tender of a smaller sum as a discharge of the greater it is made objectionable in substance.

Judgment for plaintiffs on demurrer.

GOTT V. FERRIS.

Where a party expecting that a cause would be referred was unprepared with proper evidence at the trial, and a verdict was in consequence rendered against him, the court, without expressly recognizing this as a ground, under the circumstances granted a new trial, as they considered that the case had not gone fairly to the jury, and that the latter had been influenced by the assertions of counsel not sustained in evidence.

This was an action of assumpsit for work, and labour, &c., tried before Mr. Justice Hagarty, at the last fall assizes for the county of Essex. The plaintiff's case was substantially for sixteen months' wages on a shoemaker, at \$38 a month, including the use of a house belonging to the defendant, or \$40 without the house.

The defence was set-off.

The defendant kept a small store, but no clerk. The entries in his books were made chiefly by himself; but some were made by his wife, although those made by her did not appear to have exceeded \$46. The articles charged by the defendant to the plaintiff extended over the whole period of the plaintiff's service, and consisted of provisions, groceries, articles of clothing, and such things as would be required by a man with a family, in the plaintiff's station of life.

The terms of the plaintiff's agreement were not disputed; but the defendant contended that the plaintiff had lost time, while the plaintiff asserted he had made it up by extra work.

The defendant's attorney seemed to think that the cause would be referred, and had given no instructions to his client to bring his books with him, and they were not produced at the trial.

The evidence for the defendant was a copy of the account from the books, and evidence that the plaintiff admitted

the correctness of the entries, excepting those made by the defendant's family; but his general assertion, coupled with these admissions, was, that the defendant owed him \$200 on the whole, and for this sum the jury found a verdict for the plaintiff.

In Michaelmas Term last, *A. Cameron* obtained a rule *visi* for a new trial on grounds of surprise; the absence of a material witness when the case was called; that the defendant had further evidence to adduce; that the verdict was contrary to the evidence given on the trial, and upon grounds disclosed in affidavits filed.

The affidavits were, first, that of the attorney, who said that he felt convinced the cause would be referred, and for this reason he did not so fully instruct the defendant as to his defence, as he otherwise should have done: that when the defendant came to attend the trial, he found he had not brought his books, and there was not time to send for them; that he still thought the judge would refer the cause and that he was taken by surprise on finding that the cause would be disposed of without reference, and was unprepared to produce the books; that a material witness, who had been in attendance up to the morning when the cause was called on, was absent when required; that the counsel for the plaintiff admitted on the trial that all the entries made by the defendant himself were correct, but that entries to the amount of \$200 made by others were not correct, and that since the trial it has been ascertained; and that all the charges not made by the defendant did not exceed \$50. Secondly, a further affidavit shewing all the items of the defendant's set-off, not charged by himself in his books, and stating that they amounted to \$45 98; and affidavits showing that these items were incorrect, and that the goods therein mentioned had been delivered to the plaintiff and to his family. Thirdly, the affidavit of the defendant himself verifying the entries, and swearing to the delivery of the goods to an amount exceeding the plaintiff's demand; that the plaintiff began to work for him on the 23rd of December, 1862, and working till the 11th of April, 1864, having lost a month and ten days; that he was taken by surprise, and that one witness, who had been in attendance, could not be found when the case

came on; that since the trial he had discovered a witness, of whom he was not aware until after the last trial, who could prove most of the entries in his books made by his wife to be correct.

J. O' Connor shewed cause—Under all the circumstances disclosed, of what occurred at the trial, and contained in the affidavits filed, the defendant has no right to a new trial. The chance of a cause being referred is no excuse for not being prepared, and no ground for granting a new trial. The omission to bring his books, and absence of a witness might have been cause for putting off the trial for a time, or until the next assizes, but no postponement was asked for. The defendant was willing to risk the trial on the evidence he had and did risk it. He cannot be heard now to say he was taken by surprise. There is in fact no discovery of new evidence; the proposed evidence is only in support of what he had undertaken to prove. He cited *Saunders v Vanzeller*, 4 Q. B. 260; *Hall v. Stothard*, 2 Chitty, 366; *Elmslie v. Wildman*, 8 Taunt. 236; *Turquand v. Dawson*, 1 C M. & R. 709.

A. Cameron, contra—Great injustice will be done to the plaintiff if the verdict is allowed to stand. The plaintiff had access to the books and admitted their correctness, except the entries made by others than the defendant; and while he admitted this, he asserted that these entries were \$200, when in fact they were less than \$50. If the defendant had had his books, the matter would have appeared as it really was. The books were not brought to the trial, because the attorney had instructed his client that the cause would be referred. Although the current of the authorities is against granting new trials, yet the desire of the court should be to see that no failure of justice takes place. The new evidence discovered goes certainly to that part of the case which is the real ground of dispute.

J. WILSON, J., delivered the judgment of the court.

It was, perhaps, not unreasonable for the defendant's attorney to suppose that the cause would be referred, but his proper course was to move to put off the trial. The verdict

seems to have been arrived at from the assertion of the counsel for the plaintiff, that the entries made in the defendant's books by his wife and family amounted to \$200, when in fact as it now appears, they did not amount to a quarter of this sum.

We think the case did not go fairly to the jury: the defendant may therefore have a new trial, on payment of costs.

Rule absolute for new trial on payment of costs.

ROBERTSON V. HUEBACK ET AL.

Promissory note endorsed in blank—Action by Payee against indorser.

Held, J. Wilson, J., dissentiente, that the payee of a promissory note indorsed in blank cannot, by merely writing his name above that of the indorser, maintain an action as indorsee against the latter, unless he shews he has received authority from the indorser so to do, with the express object of creating between them the relationship, and consequent liability, of indorser and indorsee.

This was an appeal from the County Court of the United Counties of Frontenac and Lennox and Addington.

The action was brought on a promissory note, made the 14th of January, 1864, by one Glackmeyer, for \$214 14, payable to the order of James Robertson, three months after date at the Bank of Montreal, in Montreal. The declaration then averred the indorsation by Robertson to the other defendant, George Hueback, and concluded in the usual form.

The defendant Glackmeyer allowed judgment to go by default.

Hueback pleaded that the plaintiff and the payee of the note were the same person.

The plaintiff replied that before the making of the note Glackmeyer was indebted to him, and it was agreed between them that in consideration that Glackmeyer would procure some other satisfactory person to indorse and become surety, as indorser, to the plaintiff, he, the plaintiff, would give time until such note fell due to Glackmeyer. The plaintiff then averred that Glackmeyer thereupon made the note declared on, and that Hueback, for the accommodation of Glackmeyer, indorsed it to the plaintiff, with the intent thereby of becom-

ing surety, as endorser, to the plaintiff, who accepted the same, and gave to Glackmeyer for the payment of the debt, and that no part of the debt had been paid.

On this replication issue was joined.

It was proved, on behalf of the plaintiff, at the trial before the learned judge of the county court, that Glackmeyer had been indebted to the plaintiff before January last; that shortly before this he had told the plaintiff he could not pay just then, but he could give a note indorsed by his father; that he left a note with the plaintiff after this, but not endorsed and the plaintiff refused to take it; that he then promised to give the plaintiff a satisfactory endorser; that afterwards by his letter of the 30th of January, 1864, he enclosed it to the plaintiff with the name of Hueback upon it as indorser; that the note was then discounted by the plaintiff or the bank, but the plaintiff did not then endorse it, nor did he indorse it till shortly before this action was brought, when the plaintiff wrote his name on the back before Hueback's name, adding the words "without recourse."

On the part of the defendants a letter, dated the 4th of February last, from the plaintiff to Glackmeyer, was put in, in which the plaintiff said: "The note you sent me is improperly made out: it should have been drawn out in favour of Mr. Hueback and indorsed over by him to me: you had better get this done and add the interest and send me it down; the other I will return you that you have now sent; also I will give instructions to the express company to return you the old bill; they have this laying in Ottawa. P. S.—Date bill at three months from the 14th of January, and add interest from date of protest made on former note, that came back unpaid."

It was also proved for the defendants that the plaintiff had told a witness that he had received a note from Glackmeyer which was of no use, and that he had written for another; that the note was not negotiable, and if he did not get another indorser he would sue Glackmeyer. The witness also said that it was a common thing to sign the name, as second endorser, before the first indorser had signed; and that he did not understand from the plaintiff that Hueback had endorsed any note for Glackmeyer.

It was contended at the trial by the counsel for Hueback, that the judge should tell the jury that there was no evidence that Hueback had endorsed the note as surety for Glackmeyer's debt to the plaintiff; or that Hueback knew of Glackmeyer's being indebted to the plaintiff.

This the learned judge declined to do. The judge found a verdict for the plaintiff, for \$222 12.

In the following term the counsel for Hueback obtained a rule *nisi* upon the plaintiff to shew cause why a nonsuit, pursuant to leave reserved, should not be entered, on the ground that the evidence was not sufficient to support the action, or to maintain the allegations contained in the replication; or why a new trial should not be granted for the misdirection of the learned judge in stating that there was evidence to warrant the jury in finding for the plaintiff on the issue joined; and because there was no evidence sufficient to sustain the verdict.

The learned judge, on argument, discharged the rule.

From this decision the defendant Hueback appealed, and the judge certified to this court, with the proceedings in the cause, his judgement thereon.

The grounds of judgment stated were to the following effect: that it was proved Glackmeyer was indebted to the plaintiff, and promised to get his father to endorse a note for the amount, in which he failed; that he then promised to get a satisfactory endorser, and afterwards enclosed to the plaintiff the note sued on, endorsed by Hueback. "Now, with what object," the learned judge continued, "did Hueback endorse the note, if not to become responsible to some one? It is a common enough thing for a person to endorse a note in blank, and he cannot plead that the note was imperfect when he endorsed it: he is estopped from denying it. It is clear Hueback, by putting his name on the back of the note, intended to become surety for some one; and the evidence shewes that this one was Glackmeyer, which fully sustains the replication. The case of *Peck v. Phippon*, 9 U. C. Q. B. 73, is indential with this on this point, and the judgment of this court was unanimously for the plaintiff."

The defendant assigned the following grounds of appeal :

1. The evidence was not sufficient to support the plaintiff's case against Hueback.
2. The replication was not proved.
3. The learned Judge misdirected the jury in telling them there was evidence to sustain the issue in favour of the plaintiff.
4. There was no evidence to sustain the finding against Hueback.

The appeal was argued last Michaelmas term.

J. O'Reilly, Q. C., for the appellant, contended that it was necessary that Hueback should have known all the facts in the replication mentioned before it could be said the replication was proved ; but at any rate it was necessary to prove that Hueback had, as it was alleged, endorsed *the note to plaintiff*, and with the intent of becoming *surety* to the plaintiff, which he had not done. He referred to *Peck v. Phippon*, 9 U. C. Q. B. 73 ; *Moffatt v. Rees*, 15 U. C. Q. B. 527 ; *Gunn v. McPherson*, 18 U. C. Q. B. 244 ; *Wilders v. Stephens*, 15 M. & W. 208 ; *Bishop v. Hayward*, 4 T. R. 470 ; *Lecaan v. Kirkman*, 6 Jur. N. S. 17.

Robert Harrison for the respondent.— The court will not interfere if there is any evidence to sustain the finding of the jury, and particularly when the judge in the court below has ruled that there was in his opinion sufficient evidence : *Manning v. Ashall* 23 U. C. Q. B. 302 ; *Lumby* 449 ; *Lecaan v. Kirkman*, 6 C. B. N. S. 929, Am. edn., S. C. 6 Jur. N. S. 17.

A. WILSON, J.—The decisions referred to in the argument establish that a replication like the present is a good answer in law to such a plea as has been here pleaded. The cases of *Wilder v. Stephens*, *Moffatt v. Rees*, *Foster v. Farewell*, and *Gunn v. McPherson*, were all determined on demurrer.

Peck v. Phippon and *Moffatt v. Rees* are the only authorities referred to in which there was a trial. The facts of the case in *Peck v. Phippon* were nearly the same as they are in this appeal.

The evidence in *Peck v. Phippon* showed, however, that the maker of that note told the defendant that he owed the amount of it to the plaintiffs, and that the note was to be given to them, upon which the maker was to get an extension of time : it appeared, also, that the plaintiffs did not add their names as first endorsers till after the action brought.

In this case there is no evidence that Glackmeyer told Hueback he owed Robertson, or that Robertson was to get the note : and it appeared that Robertson added his name as first endorser before action brought, but after the note had been dishonored.

The Chief Justice, in the case mentioned, said :

“ The question is, whether, as the delivery of the note for value is the substance, and the endorsement only the form, the name may not be written at any time ; we think it may be. * * * * And as a person knowingly endorsing a note in bank when he signed it, we think, on the same principle the defendant is estopped from saying that the plaintiffs’ names were put on when they ought to have been, in order to make his endorsment effectual ; if the plaintiffs’ endorsement had never been put on the case would have been very different.”

It is rather assumed in this passage, that the mere act of a party writing his name on the back of the note is sufficient to support the averment that the alleged endorser “endorsed the note of the plaintiff for the accommodation of the maker, with the intent of thereby becoming surety as endorser to the plaintiff,” while it is a matter of fact whether the person endorsed the note of the plaintiff or not. The mere fact of writing the name on the back of a note, with which note the writer appears to have no kind of interest is not necessarily an *endorsement* by him, and is not necessarily an endorsement to the *payee* : the production of the note and the position of the names upon it raise quite the contrary presumption ; the payee must, therefore, give *some* evidence that although his name stands as an endorser before the name of the defendant, yet in truth the defendant did endorse the note to him, and that his prior signature is one

which does not create any liability against him. See *King v. Forbes* (3 F. & F. 41.)

Hueback had no communication whatever with Robertson: it was not even shewn he was aware of Robertson being a creditor of Glackmeyer: the inference, without any kind of explanation, would rather be that Hueback thought he would not be liable to Robertson, because Robertson would have to place his name as the first endorser on the note before he could impart negotiability to it.

In *Lecan v. Kirkman*, cited in the argument, the positions of the defendant and plaintiff were similar to those of the plaintiff and defendant in this action; and the facts proved at the trial were, that the maker of the note was indebted to the payee; that the defendant should endorse a note as surety for the maker; that the defendant did put his name on the back of the note at the plaintiff's request, which note was payable to the plaintiff or order; that the plaintiff wrote her name under that of the defendant, but after the note fell due she erased it and placed it above the defendant's. The jury found a verdict for the plaintiff; but leave was served to move to enter a verdict for the defendant, if the court thought there was no evidence of an endorsement by the defendant, and the court was to be at liberty to draw all proper inferences.

Cockburn, C. J., said: "Was there an implied authority to the plaintiff to put her name above the name of the defendants on the back of the note, so as to constitute him an endorser from her, thereby enabling him to endorse to her, and thus to make him liable to her as endorser? Now I do not think it necessary to decide whether there were not here such circumstances as made in favor of the payee in this respect—whether the payee, not having first placed her name on the instrument, there can be such an authority as has been suggested: that I think it is not necessary to decide in this case, because there is no authority expressly given, and it cannot be complied from the facts of the case; for the defendant, by the plaintiff's request, simply puts his name on this instrument *valeat quantum*, and we think we should not be justified, from these facts, in implying that she had any authority where there is no express authority. There-

fore, in the absence of any express authority, it is not necessary to enquire what was sufficient to imply authority."

It will be observed that the court seems to be of opinion, as appears also throughout the argument of the case, that the payee's name should have been actually placed upon the note as first endorser, before the name of the defendant was put as second endorser, in order to establish the facts that the defendant endorsed to the plaintiff; but they do not decide this: they simply decide that upon the facts proved the plaintiff had no authority to put her name as first endorser in order to make the defendant, as endorser, liable over to her as endorsee.

Upon the authority of this case, and upon the general law governing such instruments, we cannot see how the defendant in this appeal can be said to have "endorsed this note to the plaintiff, with the intent thereby of becoming surety, as endorser, to the plaintiff."

There is much less evidence in the present case, from which an authority could be implied in the plaintiff to put his name above the name of Hueback, so as to make him liable as an endorser to the plaintiff, than there was in the case referred to; and there is much less evidence here also than there was in the only cases which, in our courts, resulted in an issue of fact.

In *Matthews et al. v. Bloxsome* (10 Jur. N. S. 998), a name written or endorsed on a blank piece of paper was held to constitute the party under the facts proved a new drawer of the bill, which was afterwards filled up, but not to make him liable as an endorser to the payees.

The Chief Justice said, "No title or legal interest ever passed through the defendant to the plaintiff, and no person can be used as endorser who does not pass such an interest."

It does not appear very clearly what estoppel there could be between Robertson and Hueback, the immediate parties, to preclude Hueback from showing the actual truth, that the note was imperfect when he put his name upon it; for there is evidence that he did not endorse it to the plaintiff. No doubt he could have been estopped if he had done anything which induced an innocent holder for value to take it as a valid note.

While, therefore, the defendant has contended all through that there was no evidence to sustain this issue for the plaintiff, and the learned Judge has decided that there was sufficient evidence to sustain it, I cannot deny the defendant the benefit of his objection, when I am of opinion that upon this evidence there was no authority expressly given to the plaintiff to put his name on the note, as first endorser, for the mere purpose of assuming the new character of endorsee, in order to sue the defendant as his endorser; and such an authority cannot be implied from the facts stated.

I think, therefore, the appeal should be allowed, and that the court below should rescind the rule discharging the defendant's rule for a nonsuit or a new trial, and make the defendant's rule for a nonsuit absolute.

RICHARDS, C. J.—I concur in the judgment of my brother Adam Wilson, because I think the evidence for the plaintiff does not go far enough. If the plaintiff had shewn that Hueback was aware that Glackmeyer was indebted to him in the amount of the note, and had promised to give him an endorsed note to secure the payment of the sum so due, and that Hueback had endorsed this note to enable him to send it to the plaintiff to carry out that arrangement, then, I think, the case would be within the rule established by the case to which the learned Judge of the County Court refers in his judgment in the court below. The facts in evidence in this case do not (as assumed in *Moffatt v. Rees*, reported in 15 Q. B., page 527, *et seq.*) make it clear that the defendant knew he was endorsing for Glackmeyer in order to enable him to get time from the plaintiff for the debt he owed him. It may have been that Glackmeyer represented to him that he was about to raise money on the note, and that, as it would require to be endorsed by the plaintiff, he would run no risk in endorsing it; or he may have represented that he was to pass it away to some other person. There is nothing to show that he was aware even that Glackmeyer was dealing with the plaintiff, or owed him anything.

To enable a plaintiff to recover on these informal instruments, I think it ought to be clearly shown that the endorser either endorsed it after the payee had endorsed it, for the

promissory note for \$2,007, dated the 23rd of July, 1858, made by the defendants, payable to the plaintiff one month after date.

The defendants pleaded, 1st. That the amount in the second note included the amount of the first note; 2nd. Usury to the amount of \$350 in the first note; 3rd. Usury to the amount of \$800 in the second note; 4th. Never indebted to the common count; 5th. Payment; 6th. Set-off.

The defendants called the plaintiff as a witness. He denied that the second note included the amount of the first one; that there was usury as alleged, although he admitted it to a less extent; that the notes which the defendants had given him were collateral to these notes, or that the proceeds of them were applicable to their payment. He admitted that both notes were renewals of former notes; that he had notes from the defendants to a considerable amount which he had collected, but he said that none of the money which he had received on these notes was applicable to the two notes sued upon.

The defendants proved by other witnesses that the plaintiff had admitted these notes were collateral to the money advanced on the notes in question, and that the plaintiff had said in March or July, 1858, and after one of the defendants had failed, that he should not lose over £8 or £9 by them. The jury found for plaintiff \$3,750 damages.

In Michaelmas Term last, *S. B. Freeman*, Q. C., for the defendants, obtained a rule *nisi* for a new trial on the grounds that the verdict was excessive and contrary to the evidence in this, that the evidence proved a large set-off which the jury did not allow; and on grounds of surprise at the evidence given by the plaintiff, and on grounds disclosed in affidavits filed, which shewed that the verdict was wrong, and should be for the defendants, or, if for the plaintiff, for only a small amount.

Todd, one of the defendants, in his affidavit filed on this motion, represented that previously to the 12th of September, 1856, he and one Nichol had carried on the business of carriage makers at Galt; that Todd then bought out Nichol; that Bryden had been a journeyman blacksmith, and Walker a journeyman carriage maker, with Todd

and Nichol; that on that day Todd, Bryden, and Walker had become partners in that business, and continued in it till the 10th of August, 1858, when they failed; that in a few months after the commencement of the business, it became necessary to borrow money from the plaintiff, which was done by giving him the note of the firm for the amount borrowed, adding to it interest at the rate of three per cent. per month, and delivering to the plaintiff at the time the notes of their customers as collateral security; that this continued for about twenty months, the original notes being renewed every three months, with interest at the same rate, and other sums borrowed from time to time also added, and other notes of customers also delivered as collateral security; that he entered in a book belonging to the plaintiff, and left in his possession, a list of all these notes so delivered as collateral security; that they were all given as collateral security excepting one of Archibald Henderson for £100; that as he renewed the notes from time to time he usually took up the old ones; that the first note, now sued on, for \$900, was taken into account and included in the second one for \$2,700, which covered the whole amount of the advances made by the plaintiff to the defendants, with interest at the rate mentioned; that he ought to have had the note for \$900 given to him, but he neglected to take it up; that at this time the plaintiff held notes of the customers of the defendants for over \$4,000, as collateral security for this note of \$2,700; that the defendants failed in business on the 10th of August, 1858, and that for some months before their credit had been bad, so that the plaintiff would not give money except by getting notes as collateral security; and that the defendants had proved at the trial that the plaintiff had collected on these collateral notes over \$2,659, and had been paid other notes which he was not then able to prove.

The defendants filed the affidavit of Armstrong, McCram, and Kirkpatrick. Both Armstrong and Kirkpatrick said that, after the trial, the plaintiff admitted that he had a book in which a list of the notes left by defendants with him as collateral security was entered; but that it was a longer and narrower one than the one described at the trial,

and that part of the notes was entered in pencil there. He reiterated what he proved at the trial.

Armstrong also repeated what he said at the trial, and swore to this new admission, he having been with Kirkpatrick on the occasion.

During the present term *J. B. Read* shewed cause.—The evidence given at the trial sustained the verdict, and it ought not therefore to be disturbed. He read the affidavit of the plaintiff in answer to the affidavits filed by the defendants, in which he reiterated what he said at the trial, and reasserted that he had a book containing a lot of notes given to him by the defendants as collateral security, but that it had been destroyed, as he considered it useless; but he said the book containing the list of notes mentioned and referred to by Armstrong and Kirkpatrick was a private memorandum book of his own, kept for his personal satisfaction and reference, and no other person had any right to view or inspect the same. He swore that the note for \$900 was not included in the one for \$2,700; that both were wholly unpaid and unsecured by any collateral notes; that even if he made the statements sworn to by Armstrong and Kirkpatrick, they had reference to other monies than those for which the notes were given, and that such statements must have been made as evasive answers, for there was no truth in them.

J. WILSON, J., delivered the judgment of the court.

We are not satisfied that justice has been done in this matter. For what reason we do not know, but these notes have been sued just in time to save the Statute of Limitation. The original dealings of these parties did not extend over a period of twenty months, and were not so complicated in their nature as to produce much uncertainty unless by design. The real question is, whether the plaintiff in fact got any, and what notes in collateral security for the notes sued upon, and what amount he collected and should have credited. That some notes were so received by the plaintiff he does not deny, and we think he does not satisfactorily account for them. In whatever book the list of these notes was entered, the defendant's right to see it

admits of no doubt, for it probably afforded the best evidence of the real state of the transaction. The plaintiff, when asked about this book, denied he had it, alleging he had torn it up as useless. He now admits he has a book in which entries were made respecting these notes ; but he says it is private, and no one has a right to see it. In this he is mistaken. If he does not exhibit it to the court and jury for their satisfaction, they have the right to infer that it contains evidence unfavorable to him in the matters in dispute between him and the defendants. The defendant's affidavit is distinct and positive in its terms. The plaintiff's, on the contrary, is evasive and unsatisfactory. We think there ought to be a new trial, costs to abide the event.

Rule absolute for new trial, costs to abide the event.

MCGUIRE v. SHAW.

Principal and agent—Sale by latter out of ordinary course of dealing—Con. Stats. C. ch. 59—Question for the jury.

Where the plaintiff employed his brother W. as agent to conduct his business at T., which he himself left to carry on business at N., and the defendant purchased from W. certain goods, alleging that he had so purchased them out of the ordinary course of dealing with W. as agent of the plaintiff, under a special contract, by which W. had agreed to sell to him and allow him to credit half the price on an antecedent debt due by W. to him.

Held, that Con. Stats. C. ch. 59 did not apply to a case of this kind.

Held, also, that the jury should have been directed to find whether the plaintiff had permitted W. so to carry on the business as to allow him to make this special sale to the defendant.

This was an action of assumpsit on the common counts, tried before Mr. Justice John Wilson at the last fall assizes for the United Counties of York and Peel. The item chiefly in dispute was the sale of 804 gallons of rock oil at fifty cents per gallon, which the plaintiff contended he had sold the defendant. The defendant contended that William McGuire, the brother of the plaintiff, sold the oil, and that half of the price was to be credited to William on a debt he formerly owed the plaintiff, and the other half on account of the plaintiff's dealings with the defendant.

It appeared, that before and up to the month of June, 1863, the business of a grocer had been carried on in Toronto

by William McGuire, his brother Daniel, the plaintiff being then his salesman and servant; that some time in June of that year the stock of goods then on hand had been sold by William to Daniel for \$800, as the defendant alleged, fraudulently; that they had changed places, Daniel becoming the owner, William his salesman and servant. After a time William went to Chicago, but after an absence of three months, returned to Toronto, and agreed to carry on the plaintiff's business at a salary. Daniel went to Niagara and carried on business there; William remained in Toronto, and as agent carried on the business for the plaintiff, who dealt with the defendant from the 24th June, 1863, till the beginning of the year 1864. The defendant seemed to have recognised the change, for the pass book containing their dealings was headed "Mr. D. McGuire, bought of W. J. Shaw," and in the course of that dealing Daniel paid to the defendant two hundred dollars through William.

On the 18th of December, 1863, the defendant got from William this oil. He said it was Daniel's oil sold by him as his agent to the defendant, who says that he bought it from William, who agreed that half the price should be applied on his own old debt, and half on the current account between the plaintiff and him.

It was left to the jury to say whether the oil was the property of the plaintiff or of William McGuire, and whether the terms of the sale were as the plaintiff, or as the defendant, represented them. The jury found for the plaintiff, giving as damages half the value of the oil, the other half having been balanced by the dealings between the plaintiff and defendant.

In Michaelmas Term *Robert A. Harrison* obtained a rule nisi to set aside the verdict and for a new trial upon the grounds, that the verdict was contrary to law, evidence, and the weight of evidence, and the judge's charge in this, that either William who sold the oil to defendant was its owner, or the plaintiff allowed him to deal with it as if he were the owner, and that William did so; and that upon the dealings had between the parties there never was a debt sufficient to entitle the plaintiff to maintain this action; and for mis-direction and non-direction of the learned judge in this

that he left to the jury the question, whether or not the plaintiff was the owner of the oil, without also leaving to them the further question whether or not the plaintiff had not allowed William to deal with it as his own, and whether or not William had not in truth so dealt with it, and to deduct from plaintiff's claim the amount charged for the oil; and in this, that the judge omitted to tell the jury that William was an agent entrusted with the possession of goods within the meaning of chap. of the Con. Stats. of Canada, or that there was evidence from which the same might be inferred; and if so, that the alleged sale was protected by the provisions of that statute. Or why a new trial should not be granted upon the ground of excessive damages, and upon the discovery of new evidence, disclosed in affidavits filed.

T. Moss shewed cause.—The evidence is sufficient to support the verdict, although it would sustain a verdict for defendant. There was no mis-direction, for the question was properly left to the jury to say whose the oil was, and whether its sale was as the plaintiff represented it, or as the defendant represented. Where there is evidence to support either view, and there is no mis-direction, the court will not grant a new trial. *The Queen v. Chubbs*, 14 C. P. 32, and cases cited there shew this. The affidavits do not disclose what the new evidence is, and whether it has been discovered since the trial, and therefore a new trial cannot be granted on this ground. There was no non-direction, for the case presents no other view than the one upon which the direction was given.

Harrison, contra—The verdict was contrary to the judge's charge, which was, that the plaintiff's case was suspicious, that there was evidence from which they might infer that the business belonged to William all the time, that the oil was bought from the refiner Fleming by William and there was no evidence of a sale to Daniel. The weight of evidence was in favor of the defendant. The learned Judge, besides directing as to who was the owner of the oil, ought to have charged the jury to say whether or not the plaintiff had allowed William to deal with it as his own, and that he was an agent entrusted with the possession of it in accordance

with the Con. Stats. of Canada, Cap. 59. The affidavits disclose this new fact, that the original invoice of the oil shewed that it was sold to William, not to the plaintiff. The damages were excessive, although if the jury upheld the plaintiff's view of the case they were not so. He cited *Ramazotti v. Bowring at al.* 7 C. B. N. S. 851; *Eades v. McGregor*, 8 C. P. 260, contending that the non-direction here was the same as in the case of *Ramazotti v. Bowring, et al.*

J. WILSON, J. delivered the judgment of the court.

This case, as prevented by the plaintiff, was one for goods sold by him to the defendant in a course of dealing perfectly understood between them, and admitting of no question as to the ownership of the business; for the pass-book shewed that the defendant's debtor was the plaintiff, so far as the goods entered there were concerned. The defendant scarcely denied that his general dealing was with the plaintiff, and that William was the plaintiff's agent; but he seemed to expect that William would pay in some way his former debt. He represented to the court and jury that this sale of oil was not in the ordinary course of their dealing, but the subject of a special contract, by which William agreed to sell it to him, and allow him to credit half its price to the plaintiff in their dealing, and half on the old debt which William owed him.

We think the Con. Stats. of C., cap. 59, do not apply to this case.

By the 5th sec. the defendant could not set up an antecedent debt of the plaintiff's agent against goods sold under that act.

The question of the ownership of this specific article became important in this way, that if it was William's own oil, he had a right to sell it as he pleased, and the plaintiff had no right to question what he did in regard to the half of its price as between William and the defendant. But if it was the plaintiff's oil, and William out of the ordinary course of his dealing allowed half of it to be applied on his own debt, the plaintiff had a right to question this

sale to the defendant; and then the question arises whether, if the oil was the plaintiff's, he had not so conducted himself as to enable William to deal with it as his own in selling it to the defendant.

The judge who tried the cause charged the jury to say, whether the whole business was not in fact William's business, carried on in the plaintiff's name for William's benefit; that there were circumstances to warrant this conclusion, and to say whether this oil was not William's own, for he admitted he brought it in his own name, although he said he first sold it to the plaintiff before he sold it as the agent of the plaintiff to the defendant; and to say, whether they adopted the plaintiff's representation of the sale as the defendant's.

This case is different from the case of *Ramazotti v. Bowring*. There the business was carried on in the name of The Continental Wine Company. Ramazotti was the owner, but the business was carried on by Nixon, his son-in-law, who was indebted to Bowring and Arundell, whom he induced to take the goods in question in part satisfaction of his debt to them. The form of the receipt and invoices, as well as the sign and mode of carrying on the business, left it questionable whose business it was.

Ramazotti brought the action. The defendant set up their set-off. The Common Sergeant left it to the jury to say, whether the plaintiff or Nixon was the owner of the business conduct under the name of the Continental Wine Company; that if the plaintiff was to find for him, if Nixon was to find for the defendants.

A new trial was ordered, for the question should have been, whether Ramazotti so conducted himself as to enable Nixon to hold himself out to be the true owner of the goods, whether Nixon did so hold himself out, and whether in dealing with Nixon the defendants believed him to be the owner.

The further question in the case before us ought, perhaps, to have been left to the jury to say, whether the plaintiff did so permit William to carry on the business as to allow him to make this special sale to the defendant, even if they found that the oil did belong to the plaintiff.

It might have influenced the jury in determining the questions preliminary to the final one, which was, whether this oil was sold on the special contract, for which the defendant contended

We are not satisfied with the verdict; but there was sufficient evidence to sustain it, and we should have been unwilling to disturb it, merely because we think the evidence would have better sustained it if it had been for the defendants, if we had been satisfied that the case had been submitted to the jury with full directions. The rule for a new trial will be made absolute, costs to abide the event.

Rule absolute for new trial, costs to abide the event.

SPETTIGUE ET AL. V. GREAT WESTERN RAILWAY CO.

Railway company—Carriage of goods— Special condition.

The plaintiffs delivered to the defendants, a railway company, for carriage, a quantity of oil, which the defendants accepted under certain conditions indorsed on a receipt given to the plaintiffs, providing that they would not be responsible for leakage, delay, or loss of market, &c.

Held, on the authority of *Hamilton v. G. T. R. Co.*, 28 U. C. Q. B. 600, that such delivery and acceptance constituted a special contract which exempted the defendant from all liabilities for loss sustained in consequence of the accidents provided against, though such accidents had been caused by the defendants' negligence.

This was an action brought to recover damages for the leakage from the non-delivery of fifty barrels of oil which had been delivered by the plaintiffs to the defendants at Hamilton, to be forwarded to Montreal.

The first count alleged that in consideration that the plaintiff would deliver to the defendant, being carried for hire, certain goods at Hamilton, to be carried to Montreal and there deliver to the plaintiffs for reward, the defendants promised to carry and deliver them within a reasonable time: breach, that they did not deliver them within a reasonable time, whereby plaintiffs lost divers gains and profits, and the goods became of less value.

The second count was the same in substance; breach, that plaintiffs lost great gains, which they would have made by selling the goods.

The third count was the same: breach, that defendants did not safely carry the goods, but negligently carried them: that they were damaged and diminished in quantity, and deteriorated in quantity and market value.

Pleas—1st. That the defendant did not receive the goods, nor were they delivered to them, on the terms and for the purpose in the declaration alleged.

2nd. Not guilty.

On these pleas issue was joined.

The case was tried before Hagarty, J., at the last fall assizes held at London. The plaintiffs proved that the fifty barrels of oil in question had been shipped to Hamilton, consigned to one Cann, in the same train with fifty other barrels consigned to the defendants at Montreal. At the time the train arrived in Hamilton the steamer "Passport" was lying at the Hamilton wharf, and the fifty barrels which had been consigned to Montreal were put on board, and no complaint was made as to them. The other fifty barrels which had been consigned to Cann, in Hamilton, were at the station on the 15th September. Mr. Perkins, the plaintiff's agent, being in Hamilton, got our orders from Cann to deliver the oil to him. He thereupon directed the oil to be put on board the "Passport," consigned to the plaintiffs in Montreal, giving directions to have it put on board that afternoon. He said that there was ample time within which to have done it, and they promised to do it before he left. The "Passport" sailed on the morning of the 16th without the oil. It was subsequently shipped on the steamer "Champion" on the 25th, and did not reach Montreal till the 28th, when the plaintiffs received it under protest. The plaintiffs proved that the oil had been sold in Montreal by a broker on or about the 12th, to arrive and be delivered within six days, at forty-five cents per gallon. It did not arrive, and the sale was lost. It was subsequently sold for thirty-seven cents a gallon; and it had leaked in the meantime by exposure to an extent beyond what was usual. The damages claimed were for this loss and leakage. The plaintiff put in the receipt of the defendants for these goods, dated 15th September. The fifty barrels of oil were to be sent by the defendants subject to their tariff, and under the conditions stated on the other

side of the receipt. The conditions were that the defendants were not to be liable for leakage, or delay, or loss o market; that all goods addressed to consignees resident beyond the places at which the defendants had stations, and respecting which no directions to the contrary should have been received previous to arrivals at the stations, would be forwarded at the cost of the owner to their destination by public carrier or otherwise, as opportunity might offer, without any claim for delay against the defendants for want of opportunity to forward them; that the delivery of the goods by the defendants would be considered as complete and the responsibility to have ceased, when such carriers should have received notice that the defendants were prepared to deliver to them the goods, and that the defendants were not to be responsible for any loss, damage, or detention that might happen to goods so sent by them, if such loss, damage, or detention occurred after the said notice, or beyond their limits.

The defendants proved that the oil came too late to be put on board on the afternoon of the 15th; that as the cars frequently were, they could not always get goods to the Hamilton wharf; that it was taken there on the 16th, and offered to every steamer till the 25th, all declining to take oil till that day, when the "Champion" took it, and it arrived at Montreal on the 28th September.

The defendants moved for a nonsuit, but the judge allowed it to go to the jury, with liberty to move against it. The jury found for the plaintiffs, and \$200 damages.

In Michaelmas Term last, *Æ. Irving, Q. C.*, for the defendants, obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit on the leave reserved, on the ground that the plaintiffs had established that they had entered into a special contract with the defendants, whereby they agreed only to carry the oil on certain conditions, which exempted the defendants from liability for the causes of action mentioned in the declaration.

D. Glass shewed cause.—There is no mutuality in the contract upon which the defendants relied, and they are not bound by it. The goods were delivered to the defendants as common carriers, and the conditions were imposed upon

the plaintiffs whether they would or not. He cited Chitty on Carriers, 66, 88, 135, 140; Taylor on Ev., 4 ed., 288, 314; *Hamilton v. G. T. R. Co.*, 23 U. C. Q. B. 600; *Peck v. N. S. R. Co.*, 8 L. T. N. S. 768.

Irving, in support of the rule, contended that the parties had mutually entered into the contract upon which the goods had been carried, and that the plaintiffs were bound by those conditions. He cited *Fowles v. G. W. R. Co.*, 7 Ex. 699; *Crouch v. London & N. W. R. Co.* 7 Ex. 705; *White v. G. W. R. Co.*, 2 C. B. N. S. 7; *Hughes v. G. W. R. Co.*, 14 C. B. 637; *Peck v. N. S. R. Co.*, 8 L. T. N. S. 768; and referred to clauses 7, 12, 13, 14, & 16 of the contract.

J. WILSON, J., delivered the judgement of the court.

The oil was at the station in Hamilton, and might have been put on board the steamer "Passport" on the afternoon of the 15th of September, 1863, if reasonable diligence had been used; but it was not taken to the wharf till the 16th, after this vessel had sailed. It was left on the wharf ready to be loaded by any boat which would take it, and offered to every one which left between that day and the 25th, when the "Champion" took it on board. By the negligence of the defendants it was not put on board the "Passport," where the other fifty barrels were, and so did not reach Montreal in time to be delivered in fulfilment of the plaintiffs' contract for delivery there: the market fell in the meantime, and the plaintiffs' case is, that he lost seven cents per gallon by the subsequent sale. Although it is conceded that a certain percentage of leakage arises in ordinary transport, a much greater average of leakage obtained here, from the exposure of the barrels on the wharf at Hamilton: for this damages are sought on the third count. It admits of no doubt, that if the liability of the defendants had not been limited, they would have been liable for the loss on both grounds; but the contract exempts them from all that the plaintiffs complain. It was argued with force and ingenuity, that this case was not provided for by the conditions on the back of the receipt for the goods, because Hamilton was a point beyond which the defendants did not themselves carry them, and the goods were delivered to them there; but we think,

that whether the goods were delivered at a station remote from Hamilton or there, the conditions equally apply. We feel the same difficulty which the Court of Queen's Bench felt in the case of *Hamilton v. The Grand Trunk Railway Company* (13 U. C. Q. B.), that by our decision of this case, on the authority of that case and the cases cited there, we shall be encouraging the servants of companies, like the defendants, in being careless and negligent in the transport and handling of goods; but we are bound by these authorities, and contrary to our own conviction of what would be really right, but for these decisions. We think, therefore, the defendants in law are not liable for either branch of the damages sought. The rule will be to enter a nonsuit pursuant to the leave reserved.

Rule absolute to enter nonsuit.

SLOAN ET AL. V. WHALEN.

Ejectment against tenant of executor of the debtor—Title of executor—Denial by tenant of landlord's title as executor, after judgment against the latter as such—American probate of will—Production in evidence of original judgment roll—Lease of lands after delivery of fi. fa. to sheriff—Judgment by default, whether proof of fraud.

In an action of ejectment, upon a sheriff's sale under a *fi. fa.*, brought against the tenant or alleged tenant of the executor of the debtor, no evidence need be given of the title of the executor, or of his testator.

Such tenant cannot after judgment by default against his landlord, as executor, set up the defence that the latter was not executor.

An American probate of the will of the testator may be received as corroborative evidence of the representative character of the executor.

A judgment may be proved by the production of the roll containing the entry of it.

A lease of lands made by the agent of an executor after delivery to the sheriff of a *fi. fa.* lands against such executor, will only convey an interest subject to such *fi. fa.*

The suffering a judgment by default, in a case where a plea of the Statutes of Limitations would have been a bar to the action, is no proof of fraud in the defendant. If such judgment be fraudulent, as giving a preference to one creditor over another, it can only be objected to on that ground by a creditor, and not, as in this case, by the tenant of the executor.

This was an action of ejectment to recover possession of forty-three acres of land, being the north half of seven in the first concession, in Block C, in the township of Anderdon.

The cause was tried before Hagarty, J., at the last Fall Assizes for the County of Essex.

The plaintiffs claimed under a deed from the Sheriff of that County, who had sold it under an execution against lands, at the suit of Asa D. Dickinson, against the lands and tenements, which were of Wm. Burnell, deceased, in the hands of Oliver M. Hyde, executor of the last will and testament of the said William Burnell. The writ was sued on, on the 20th, and delivered to the Sheriff on the 23rd July, 1863.

The plaintiffs called Hyde, who said that he was trustee and executor of the late Burnell; that he claimed the land as such executor and trustee, and had allowed it to be rented to the defendant through one Cunningham, his agent; that it had been let for a year, from the spring of 1862 till the spring of 1863, although the defendant had been tenant to Hyde and paid rent for several years before: In this cross-examination he said that he had made Cunningham his agent under power of attorney in February, 1863; that a lease, produced by the defendant without date, was in Cunningham's writing, being a lease of this land for four years from 1st of September, 1864; that defendant held the land for two years at first, as it was expected the land would be sold for Burnell's debt; that he knew nothing of this lease for four years; that defendant had told him in July last he had only a verbal lease, and he (Hyde) said he had received no rent since the spring of 1863: Cunningham's agency ceased last July by revocation of the power of attorney.

The plaintiffs proved a demand of possession, and a refusal to acknowledge them as landlords.

They put in a judgment in the common pleas, *Dickinson v. Hyde*, executor of Burnell; also a probate of the will of Burnell to Hyde, Conant, his co-executor, having renounced. This probate was granted on the 22nd June, 1859, under the seal of the court of probate at Detroit, in and for the county of Wayne, in the State of Michigan. They also produced a deed from the Sheriff of the County of Essex, dated 3rd September, 1864, to the plaintiffs, and the writ of *fi. fa.* against lands, issued 20th July, and received by sheriff 23rd July, 1863.

For the defendant it was objected, that no estate passed under the deed; that no estate was shewn in Burnell; that

the proceedings did not show a regular sale, no *fi. fa.* against goods having been proved; that there was no recital that the title was in Hyde before the proceedings for sale; that the judgment and execution against Hyde as executor did not authorise the sale; that the probate was by a foreign court; that it was not shewn that Hyde was executor; that the judgment was by default; that the will shewed there were two executors, while only one was sued; that the sheriff's deed was irregular; that there was no exemplification of the judgment, and that the original judgment was not properly receivable in evidence.

On these grounds leave was given to move to enter a non-suit. The verdict was for the plaintiffs.

In Michaelmas Term last, *J. O'Connor* obtained a rule *nisi* for a non-suit, or to enter a verdict for defendant on the following grounds:—

1st. That the plaintiffs shewed no such estate in Burnell as could be sold under an execution against lands, and did not shew that a patent had issued, or that Burnell had the fee or freehold.

2nd. That the plaintiffs did not shew that Oliver Hyde, against whom judgment was obtained, was executor: they shewed an American probate of a will which proved nothing.

3rd. That the sale was irregular on the other grounds appearing on the face of the papers, and for want of an exemplification of the judgment.

4th. That the defendant's lease put in, executed under power of attorney to Cunningham, shewed a term or right of possession in defendant when the action was commenced. Or why a new trial should not be had between the parties, costs to abide the event, on the grounds above specified, and for the discovery of fresh evidence tending to shew that the judgment was collusive and fraudulent, as shewn by affidavit; and on affidavits disclosing when defendant's lease was made.

The affidavits stated that Dickinson, the plaintiff in the former action, was a son-in-law of Hyde; that his causes of action were certain promissory notes, made by Burnell in his life-time, all or most of which had been barred by the Statute of Limitation when that action was commenced; that the

judgment was obtained on a cognovit signed at Windsor; that in an action in the county court wherein one George Wilson was plaintiff, and the said Hyde, executor of Burnell, defendant, the issue was whether the said judgment was obtained by collusion and fraud, and the jury found it was fraudulent and collusive, and the plaintiff had judgment thereupon, and that notice of this had been given to the sheriff and to intending purchasers, in the hearing of White, one of the plaintiffs, before the sale under the execution.

Cunningham, who was a witness at the trial, stated in his affidavit that he was appointed by Hyde, acting executor of Burnell, to make leases of the land in question; that he made a lease of it to defendant for the term of four years from the 1st of September, 1863; that the said lease was agreed upon between Whalen and him before the time from which the term was to run, of which he informed Hyde; that the formal lease was not drawn up and signed until April or May last, but Whalen was in possession, and rent had been accruing due since the 1st of September, 1863, on or about which time the sheriff, acting on writs of possession, ejected some former tenants.

J. G. Scott shewed cause.—He cited *Doe dem. Daniel et al. v. Coulthred et al.* 7 E. & E. 235; *Tay. Ev.* 123; *Mandeville v. Nicholl*, 16 U. C. R. 609; *Graham v. Nelson et al.* 6 C. P. 280; *McDade dem. O'Connor et al. v. Dafoe*, 15 U. C. R. 386; *Moran v. Patton*, 10 U. C. R. 640; *Roe et al. v. McNeil et al.* 13 C. P. 189; *Roscoe*, N. P. 10 ed. 92.

A. Prince, Q. C., contra.

J. WILSON delivered the judgment of the court.

The first question presented is, whether Burnell had such an estate as could be sold under an execution against lands. If Burnell had himself been in possession, as the apparent owner, he would *prima facie* have been held to be the owner in fee, if such lands had been sold under a writ of *fi. fa.* against him. He might have shewn, as matter of defence, that he had but a term for years, but he would not be permitted to say to the sheriff's vendee, when he sought possession by an action of ejectment, "You can't recover,

because you have not shewn that I had an estate in fee or in freehold," if a contrary interest did not appear.

In this case we have the tenant of Burnell's executor and trustee, or at least we have one holding himself out as tenant of his executor, objecting that no estate was shewn in his lessor, which was liable to be sold under this execution: but if Burnell would not have been permitted to object, those who represent his estate and claim under him can be in no better position than he was. *Moran v. Patton* 10 U. C. Q. B. 604 is an authority on this point, that if the action be against the debtor in the *fi fa.*, no evidence need be given of his title.

Secondly, it is said plaintiffs did not show Hyde was executor. They shewed an American probate, which the defendant says is nothing.

When the action was brought, it was open for Hyde to plead that he was not executor of Burnell, but he confessed it. After judgment he could not set up that he was not executor, or that there was another executor, who had not been sued; but if he could not, the person occupying lands of his testator, who by that occupation was recognizing him as executor, could not; and this is the relation in which this defendant stands towards Hyde. Nor was the American probate nothing. It might not have been available if Hyde had been plaintiff, and his representative character been the question, but it proves nevertheless, that it was not a mere pretence that he was executor; and Hyde himself, besides having admitted it on record, swears he was executor and trustee of Burnell; and this American probate shews so far as it can be looked at, that he was sole executor, for his co-executor had renounced.

Thirdly, as to the irregularity appearing on the proceedings. We see none. It is usual and proper to prove a judgment by an exemplification of it, but is the proof less, that the judgment itself was produced? Since the law was changed allowing judgments to be entered in the offices of the deputy clerks of the crown, such judgments have not been so regularly returned as they ought to the principal office, to be docketed; and in this case, the judgment roll remained in the office of the deputy clerk of the crown. It

was optional with the learned judge to allow it to be produced or not. We think he might very properly have directed the clerk not to bring a record from its proper custody, but he did allow it, and the roll being there was proof of the judgment being the judgment itself.

Fourthly, as to the lease. On its face, and as now explained by Cunningham in his affidavit, it is of a very doubtful character. It bears no date: Hyde denies all knowledge of it. The defendant's declarations to him as to his holding are inconsistent with it; and now Cunningham says it was executed in April or May, 1864, and created a term from the 1st September, 1863, for four years. In our view of the case nothing depends upon this lease, for it was made after the writ of *fi. fa.* had been placed in the sheriff's hands. Hyde himself was not then in a position to have made such a lease, and his attorney could do no more than he could. The writ bound the lands from the time the sheriff received it, which was on the 23rd of July, 1863.

There was besides some evidence of the defendants having disclaimed the title of the plaintiffs.

The defendant seeks for a new trial because the judgment was fraudulent and collusive. The fraud charged is, that part of the claim, if not all, was barred by the Statute of Limitations. In what way Hyde is to be charged with fraud because he did not plead the statute of limitations we are unable to see. A man has a right to plead the statute of limitations, and wrong cannot legally be charged upon him who does it; but certainly it does not detract from his honesty or leave him open to the charge of fraud who declines to plead it.

In the County court action, the judgment may have been fraudulent, as giving a preference before another creditor, but a creditor only can object to this. The defendant is not a creditor; he has no standing to set up that this judgment was fraudulent any more than Hyde has. Hyde would not be permitted to set up his own fraud to defeat a judgment against him nor can any one holding his property under him set up his fraud. The rule will be discharged with costs.

Rule discharged with costs.

WILKINS v. ROW.

Injury resulting from the clearing of land—Refusal to interfere with verdict of jury.

A man must exercise care and discretion as to the time and mode of clearing his land; and if his neighbor be injured by rashness or inconsiderateness on his part, he will be liable to him for the damage.

It is, however, always a question for the consideration of the jury whether or not a man has exercised his own right to the injury of his neighbour; and where the case has gone fully to them, with all proper directions on the law by the presiding judge, their verdict will not be disturbed by the court, unless it is contrary to law, even though the evidence would fully have warranted a different finding.

This was an action for setting fire to the plaintiff's woods. The trial took place at the last fall assizes, at Cobourg, before Morrison, J.

The facts of the case, as they appeared in evidence, were, that the defendant, desiring to make a small clearing on his land, which adjoined the plaintiffs, merely for the purpose of a turnip-patch, as it was called, during the very dry weather of the previous summer set fire to a portion of his premises, and the fire extended into and burned a large tract of the plaintiff's land.

There was conflicting evidence as to his having attempted to put out the fire, his efforts appearing to have been directed merely towards protecting his own property, and not the plaintiff's. The damage was very extensive, the fire having destroyed a cedar swamp which the plaintiff had protected for between forty and fifty years, the timber from which, it appeared, would have sold well for railway ties.

The jury rendered a verdict in favour of the defendant.

C. E. English obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law, evidence, and the weight of evidence.

Hector Cameron shewed cause.

J. WILSON, J., delivered the judgment of the court.

The defendant had the right to clear his own land at any time, provided he did not injure his neighbour in doing it. In dry weather he was bound to exercise prudence and discretion in setting fire in his own clearing; and if he did so rashly and inconsiderately, in a place where, and at a time when, it was likely to injure his neighbour, and it did

injure him, he was liable for the damage. These are rules deducible from considerations of natural right, and from time immemorial have been embodied in the legal maxim, "*Sic utere tuo, ut alienum non lædas.*"

But whether a man has exercised his own rights to the injury of his neighbour or not must be always a question for the consideration of the jury under all the circumstances of every particular case. Here all the circumstances were spread before them, and the learned judge gave all proper directions in point of law: no fault, indeed, has been found with the charge, but they found for the defendant.

The court is asked to grant a new trial, because the verdict is said to be contrary to law and evidence, and the weight of evidence. We think it was not contrary to law: certainly the evidence would have fully warranted a verdict for the plaintiff. The facts of the case were of a character familiar to the occupations of the jury, about which they were not likely to form an erroneous judgment. It was unfavourable to the plaintiff's view of it, and we cannot on authority disturb it. The rule will therefore be discharged.

Rule discharged.

GREAVES V. HILLIARD.

Trespass to land—Evidence of possession.

Where the only evidence of possession was the entry by plaintiff upon, and his presence at the survey of, the land, the trespass to which had been previously committed and was the cause of action, claiming it as his own, but shewing no title, the defendant also assisting at the survey and not objecting to plaintiff's right of possession, though asserting his own right to have committed the trespass complained of,—

Held, that there was no evidence of either actual or constructive possession in plaintiff to entitle him to maintain trespass; but that had he shewn any title to the land this would have given him a constructive possession.

This was an action of trespass. The first count of the declaration was for cutting trees and underwood belonging to the plaintiff on the north-east half of lot number four in the sixth concession of Harvey, in the county of Peterboro; and the second count *de bonis asportatis*.

The pleas were Not guilty, and a denial that the property was the plaintiff's.

The case was tried at the last fall assizes at Peterboro', before Morrison, J.

The plaintiff proved at the trial that he had caused a survey of the lot to be made as his in 1861, when he took possession; that the defendant went with the party to trace the lines; that the plaintiff then offered to sell the pine trees on this part of the lot to the defendant; that the plaintiff was upon the lot at the time of the survey claiming it as his, but that he had never been in the actual possession; and that defendant, on being charged with the trespass, asserted his right to do it: the plaintiff also gave evidence of the trespass by the defendant. The defence went to shew, that the defendant had not committed all the trespass alleged, although he had done part, and his foreman proved that he had been ordered by the plaintiff not to cut trees on this part of the lot; that they had cut four or five but left them. The jury found for the plaintiff and \$30 damages.

The defendant had leave reserved to move to enter a nonsuit on the ground, that the plaintiff did not shew a sufficient possession of the land to entitle him to maintain this action.

In Michaelmas Term last, *D. B. Read, Q. C.*, removed for and obtained a rule *nisi* to enter a nonsuit on the leave reserved.

N. Kingsmill shewed cause.—The plaintiff has shewn an entry and acts of ownership. He has also shewn the defendant's recognition of his right by helping to trace the lines. Any possession is sufficient against a trespasser: *Lambert v. Stroother, Willes'*, 218. The possession was a proper question for the jury: *McNiel v. Train*, 5 U. C. Q. B. 91; and of this possession the slightest evidence is admissible; *Jones v. Williams*, 2 M. & W. 326; *Woolway v. Rowe*, 1 A. & E. 114.

Read, in support of the rule.—The plaintiff must prove either actual or constructive possession in order to maintain his action; he has done neither, and, therefore, must fail in the suit. He has in fact proved title out of himself; for he has put in a patent to one Nelles, but has not proved any deed to himself from Nelles. He cited *Heck v. Knapp*, 20

U. C. Q. B. 360; *Bailey v. McNeilly et al.*, ib. 451; *Street v. Crooks*, 6 U. C. C. P. 124; *Turner v. Cameron's Coalbrook's Steam Coal Co.*, 5 Ex. 932; *Brown v. Notley*, 3 Ex. 216.

J. WILSON, J., delivered the judgment of the court.

The law has been clearly settled, that "to entitle a party to bring trespass he must at the time of the act committed either have the actual possession, or a constructive possession in respect of the thing being actually vested in him:" *Revelt v. Brown*, (5 Bing. 7), *Smith v. Milles*, (1 T. R. 475), *Brown v. Notley*, (3 Ex. 219).

The difficulty is the application of this rule to the circumstances of any given case.

Here there was no one in actual possession. It was wild land on which there were pine trees fit for saw-logs. The trespass complained of was the cutting of some of these trees. The plaintiff had not marked out his part from the rest of the lot until he went with the surveyor and marked it. He then asserted his right to it, and as an act of ownership made the survey, at which the defendant was also present, making no objection to it or the plaintiff's right of possession, although he asserted his right to cut the trees. There was evidence of the plaintiff's being upon the land claiming it as his, but he shewed no title.

There was no evidence, we think, of actual or constructive possession in the plaintiff. If he had shewn any title, this would have given him constructive possession, but the trespass had been committed before he or his surveyor went there: we think that merely surveying a lot, and asserting a title without actual possession, would not entitle the plaintiff to maintain trespass.

The cases of *Henderson v. McLean*, (16 U. C. Q. B. 630), *S. C.* (8 U. C. C. P. 42), were stronger cases than this, and on the doctrine laid down in them we think the plaintiff ought to have been non-suited. There will be a rule to enter a nonsuit.

Rule absolute to enter nonsuit.

THE ATTORNEY GENERAL V. PERRY.

Obstructing the waters of the lakes—Information of Intrusion.

The property in the soil adjacent to the shore, and which is covered by the waters of the lakes, or of navigable rivers, is in the Crown, subject to right of the public to pass over the water in boats, and to fish and bathe therein.

Held, therefore, where the defendant had encroached on a portion of Lake Ontario, not far from land belonging to himself, but not adjoining it, by the construction therein of certain cribwork and piers, upon which he had built a warehouse, that these, not being natural accretions to his land, but artificial impediments to the waters of the lake or harbour, (the harbour being then vested in the Crown) must be considered to be upon the soil of the Crown, and that the defendant was liable to be removed therefrom on an information of intrusion at the suit of the Crown.

This was an information of intrusion filed by the Attorney General against the defendant, for entering and intruding upon that parcel of land covered with water, which lies in front of lot number twenty-six in the broken front concession of the township of Whitby, between the shore or beach on said lot and the eastern pier of the Whitby harbour.

The defendant pleaded Not guilty.

The obstruction complained of consisted in the erection by defendant of certain cribwork and piers in the *locus in quo*.

The case was tried at the assizes for the United Counties of York and Peel, holden on the 7th of January, 1864, before the Hon. Mr. Justice Hagarty.

A verdict was taken and entered for the Crown, subject to the opinion of the court upon the evidence.

For the defence an exemplification of a patent to the defendant for lot twenty-six was put in, under which it was contended by *M. C. Cameron, Q. C.*, that the defendant owned the whole of the space enclosed by the pier. He further contended that an information for intrusion could not be filed against the defendant for this space, inasmuch as it was a part of Lake Ontario.

In Hilary Term, 1864, the case having been set down for argument, *S. Richards, Q. C.*, appeared for the Attorney General.—The facts shewn at the trial entitle the Crown to the judgment of the court. The place where the intrusion by defendant was made, before the construction of the Whitby harbour, was clearly part of the shores of Lake Ontario, and merely constructing the piers would not make it any the

less land covered with water, the property of which was in the Crown. The patent under which the defendant claimed bounded the land therein described by the water's edge of lake Ontario, and though he might be entitled to the natural accretions, yet, as the place on the shore near where the buildings were put up by defendants was made into a road by artificial means and not by accretion, it could not in any way be considered the property of the defendant. Being, then, on the soil of the Crown, covered with water, the defendant intruded on it, and this action lies: *Phear on Aquatic Rights*, 41; *Attorney General v. Chambers*, 23 L. J. (Ch.) 662; 4 D. M. & G. 206; S. C. 33 L. T. 189; *Lord Advocate v. Hamilton*, 1 McQ's. H. of L. 46; and this whether it be considered that the Crown is the owner of the land and water above it, or merely the owner subject to the right of the public to pass over it. As that right was lost to the public by the construction of the harbour, the easement ceases, and the Crown, being the owner of the soil, may maintain this proceeding: *Parkerv. Elliott*, 1 U. C. C. P. 470; *Marquis of Salisbury v. G. N. Railway*, 5 C. B. N. S. 174; *Throop v. Cobourg Railway*, 5 U. C. C. P. 509; *Berridge v. Ward*, 10 C. B. N. S. 400; *Buck v. Cobourg Railway*, 5 U. C. C. P. 552; *Attorney General v. Hallett*, 1 Ex. 211; *Attorney General v. Brown*, 14 M. & W. 300; *Attorney General v. Stanley*, 9 U. C. Q. B. 84; *Attorney General v. Donaldson*, 10 M. & W. 117; Yelv. 143; *Attorney General v. Parsons*, 2 M. & W. 23; Coke Lytt. 56; *Attorney General v. Lord Churchill*, 8 M. & W. 171; Cole on Ejectment, 91, 92; The case of Alton Woods, 1 Coke's Rep. 26 b. p. 68; Woolwich on Ways, 84; Porter's case, 1 Coke Rep. 16 a. b., p. 39; Note A of same vol. as to nature of information by the Attorney General; *Goodtitle ex dimiss. Chester v. Alker*, 1 Burr. 133; *Dovaston v. Payne*, 2 Hy. Black 527.

RICHARDS, C. J., delivered the judgment of the court.

We have delayed giving judgment in this case from time to time at the request of the defendant's counsel, in order that we might hear what could be urged in his favour. During last term we were informed that the learned counsel for the defendant did not propose arguing the case on his

behalf, and we have been asked on behalf of the Attorney General for the judgment of the court.

The general received doctrine both in this country and in England is, that the property in the soil adjacent to the shore that is covered by the sea, and in the soil of navigable rivers, is in the Crown, subject to the right of the public to pass over the water in boats, and, it is sometimes added, the right to bathe and fish therein. When from any sudden upheaving an island is formed in the sea, it belongs to the Queen, from the fact that she owned the soil whilst it was covered with water, and the water being removed from it, the soil is still the property of the Crown. If the Queen owns the shore, then of course any accretion to it belongs to the Crown; but if the shore be owned by a private person, then the accretion belongs to the subject so owning the shore. But if from some convulsion the sea suddenly recedes, and leaves a large portion of the bed of the sea permanently disclosed, then it is said the land so uncovered belongs to the Crown, by virtue of the former ownership of such land.

In this country the practice has obtained in towns and cities for the Crown to grant land covered with water, and generally to the owner of the bank when adjacent to a navigable stream, and grants so made have never been cancelled for want of power in the Crown to make the grant. The right of the grantee to build wharves and warehouses for the more convenient and profitable enjoyment of the water lots so granted has never been successfully contested that I am aware of.

As far as I have been able to glance at the authorities referred to, I think they sustain the right of the Attorney General on behalf of the Crown to maintain this proceeding. In principle I see no reason why it may not be maintained. The easement of the public to pass over the *locus in quo* in boats seems to have been practically put an end to by the erection of the piers and other works for the Whitby harbour, and the erection of the cribwork and warehouse by the defendant seems effectively to have prevented the public, if so inclined, from using the water by passing over it in boats, or for fishing, or bathing. The defendant himself has, by artificial means, not by the gradual accretion from day to day, but

more like the effect of the sudden upheaving from a convulsion, raised the land of the Crown from the bottom of the lake to and above its surface: the buildings and the piering must be considered as affixed to the soil of the Crown. It does not cease to be the soil of the Crown from anything the defendant has done, and I see no reason why the defendant may not be removed from the possession of the property of the Crown upon which he has encroached. Our judgment must be for the plaintiff.

Postea to the plaintiff.

THE NORTHERN RAILWAY COMPANY OF CANADA v. DUNCAN PATTON, HENRY J. NOAD, AND WM. H. JEFFREY.

Joint Adventure—Partnership—Contract of hiring and service—Competency of witness.

Where the defendant P. entered into a written agreement, as "D. P. & Co.," with the other two defendants N. & J. as "H. J. N. & Co.," reciting that the parties had agreed to carry on certain lumber transactions *on joint account*, and providing for a *joint capital* to carry on such *joint* transactions—that advances on the joint account should bear interest,—that the returns from a certain cove should be *on the joint account*, and the rental thereof paid out of the profits of *the joint account*,—that any of the parties that might be agreed upon might contract for timber for *their joint interest*, and all expenses should be charged to *the joint account*,—that the profits or losses of *the joint business* should be divided in a certain way, and the commission, charge, and *profits* arising from *the joint account* shared equally, and in case of difference as to *their joint transactions*, arbitration should be resorted to; and where, subsequently, the said P. entered into separate written contracts with G. S. & M. to furnish D. P. & Co. a certain quantity of timber, there being no mention in said agreements of any joint stock, nor of any contribution by G. S. & M. for losses sustained, nor of any share proper of the profits to be enjoyed by them (except as to a certain class of timber, the total profits of which they were to share *equally* with D. P. & Co.), but in return for their *services* they were to receive half the profits of the timber up to a certain price per foot, which it was stipulated should belong to D. P. & Co., and be delivered to them at a certain point in Lower Canada,—that D. P. & Co. should make advances to aid in the manufacture and conveyance of the timber to its destination, and that the parties should pay them interest on such advances; and where the plaintiffs carried to T., over their railway, the timber forwarded by the said parties in pursuance of their agreements, charging the freight in their books to *said parties*, and *not* to D. P. & Co., *but parting with the timber at the request of D. P. & Co. before payment of the freight, contrary to their previous course of dealing with G. S. & M.*

- Held*, 1. That the firstly above referred to agreement, entered into by the defendants with one another, created a partnership between them, and that when P. contracted with G. S. & M., he did so as agent of the defendants, under the partnership name of "D. P. & Co."
2. That the agreement secondly above referred to, entered into between D. P. & Co. and G. S. & M., constituted a mere contract of hiring and service, and not a partnership, not even as to the timber, in the total profits of

which they were to share equally ; for that there were none of the incidents of a partnership contained in the agreements, inasmuch as there was an absence of all community of interest in the general and final result of the adventure, no interest in or share of the capital, a mere contribution of personal service towards the enterprise, for which they were to be remunerated by a certain proportion of profits, and no liability for possible losses beyond a certain sum agreed to be paid them for their services.

3. That in the conflict of testimony as to which of the parties credit was given to by the plaintiffs in their dealings, the weight of evidence and the collateral circumstances being in favour of a dealing with the defendants, and the case not having gone as fully and correctly to the jury as it should have done, a new trial ought to be granted to the plaintiffs on payment of costs.

A witness, called on behalf of the defendants to a suit, who is not a party to the record, although a partner of those calling him, is a competent witness for the defendants.

This was an action brought “for the carriage and conveyance of timber on and upon the railway of the plaintiffs, by the plaintiffs for the defendants at their request.”

The defendants pleaded never indebted.

The particulars of claim were for £4,075 5s. 6d., with interest thereon from the 1st of May, 1861.

The cause was tried before the Chief Justice of this court at the last winter assizes for the United Counties of York and Peel, when a verdict was rendered for the defendants.

It is unnecessary to insert the evidence given at the trial, as all the material facts of the case are contained in the head-note and in the judgment of the court.

In Hilary Term last, *G. D. Boulton* moved for and obtained a rule *nisi*, calling on the defendants to shew cause why the verdict should not be set aside and a new trial granted without costs on the following grounds :

First, for misdirection of the learned judge in this, that he directed the jury that on the agreements produced the defendants were partners in the particular adventures out of which the plaintiffs' cause of action arose ; and yet left it to the jury as a matter of fact to decide, whether the defendants were or were not partners in the said adventures ; whereas he should have directed the jury that in law the defendants were partners in these adventures, and that as such partners the defendants were liable to the plaintiffs on the cause of action charged against them.

Secondly, for the improper reception of the evidence of James Patton on the part of the defendants, he being a

partner in the said adventures, and therefore disqualified as a witness on their behalf.

Thirdly, because the said verdict was against law and evidence, and the weight of evidence, on the ground first mentioned; and also that the defendants were liable to the plaintiffs for the freight, the cause of this action, either as partners with Gunn, Snyder and MacAdam, or as principals for whom or for whose benefit the timber was carried; and on the admissions of the defendants by their offer to pay three thousand pounds in settlement of the claim.

McMichael, with him *Harrison*, shewed cause.—The members of the firm proper of Duncan Patton & Co. were in partnership with Gunn, and also with Snyder and with MacAdam, so that there were thus three several partnerships with these several last named persons.

The members of the firm of Henry J. Noad & Co. became in December, 1859, and were dormant partners of Duncan Patton & Co. in all the timber transactions which D. P. & Co. were carrying on in certain localities, and, as it is contended by the plaintiffs, in these transactions with Gunn, Snyder, and MacAdam. These transactions with Gunn and the others did not take place until November, 1860, so that H. J. Noad & Co. did not enter into partnership with D. Patton & Co. with any reference whatever to such transactions. H. J. Noad & Co., thus, being dormant partners, were not known to Gunn and the others at the time when Duncan Patton & Co. formed the partnership with Gunn and these others; nor was Gunn known to H. J. Noad & Co.: there could, therefore, have been no partnership between Gunn, D. Patton & Co., and H. J. Noad & Co.; and so also as to the other persons, Snyder and MacAdam.

When, therefore, D. Patton & Co. formed the new partnerships with Gunn, Snyder, and MacAdam, Noad & Co., not being partners with Gunn and these others, stood towards D. Patton & Co. as sub-partners with them personally, but not with these other persons; and, therefore, Noad & Co. cannot be made responsible to any person in respect of the primary or principal subject of the partnership formed between Patton & Co. and Gunn and the others, as they are

not directly interested in it but only in the profit or loss which D. Patton & Co. will have in these transactions, after the partnership accounts have been closed with Gunn, Snyder and MacAdam; and so they are not responsible in this action to these plaintiffs for the freight of the timber in question.

The second agreement between Patton & Co. and Noad & Co., in January, 1861, does not alter the case, because Gunn and the others still did not know of Noad & Co. as partners of Patton & Co.; but even if they had then known of it, it would not have altered the previous rights of the parties, acquired by the agreement entered into before that date, in November, 1860.

They referred to Lindley on Partnership, 268; Collyer on Partnership, secs. 8 194, 491; *Paterson v. Gandasequi*, 2 Smith's L. C., 5 ed. 295; *Loyd v. Freshfield* 2 C. & P. 325; *Swan v. Steele*, 7 East, 210; *Ex parte Emly*, 1 Rose, 61; *Shirreff v. Wilks*, 1 Ea. 48; *Ex parte Barrow*, 2 Rose, 252; *Bray v. Fromont*, 6 Mad. 5; *Ex parte Dodgson*, 1 Montag. & M'Arthur, 445; *Ex parte Hunter*, 1 Atk. 223; *Young v. Hunter*, 4 Taunt. 582; *Gonthwaite v. Duckworth*, 12 East, 421; *Saville v. Robertson*, 4 T. R. 720; *Smith v. Craven*, 1 Cr. & J. 500, S. C. 1 Tyr. 389; *Bevan v. Lewis*, 1 Sim. 376; *Alderson v. Clay* 1 Starkie, 405.

As to the admission of James Patton as a witness, he was admissible although a partner in fact; *Hitchcock v. Cronkite*, 15 U. C. Q. B. 157; but the evidence shews he was not in point of fact a partner in law. The following authorities were also cited on the same point: Consolidated Statutes U. C., p. 401; *Sage v. Robinson*, 3 Exch. 142; *Hill v. Kitching*, 3 C. B. 299; *McMullin v. Murdoff*, 19 U. C. Q. B. 506; *Johnstone v. Smith*, 10 U. C. C. P. 220; *Adams v. Toland*, 12 U. C. C. P. 119; *Bonner v. Moderwell*, 9 U. C. C. P. 504. There was no misdirection in leaving the question of partnership to the jury; *DeBlaquiere v. Becker*, 8 U. C. C. P. 167; *Pole v. Leask*, 8 L. T. N. S. 645, S. C., 9 Jur. M. S. 829. If after the partnership between Patton & Co. and Gunn and the others were formed, Noad & Co. came in, which might well be, they would not be liable for all antecedent transactions: *Ricketts v. Bannett*, 4 C. B.

686; *In re Worcester, Corn Exchange Company*, 3 DeG. Mac. & G. 280; *Ex parte Chippendale*, 4 DeG. Mac. & G. 19. But however the fact of partnership may have been, the plaintiff expressly refused to deal with D. Patton & Co., or with any other persons than Gunn, MacAdam, and Snyder; and, after having so deliberately elected, they cannot now hold D. Patton & Co., whoever the members of that firm may have been, liable to them, but must look only to Gunn and the other lumberers with whom they kept their accounts.

J. H. Cameron, Q. C., with him *D. G. Boulton*, contra.—All of the present defendants were partners; and whether Gunn and the others were is of no special consequence, as no exception has been taken for non-joinder. The agreements between D. Patton & Co. and the different lumberers disprove anything like a partnership between them. If there were any sub-partnership, it was between the lumberers and D. Patton; the perfect partnership was that which was made between Patton & Co. and Noad & Co.: the subsidiary one was that, if any can be said to have existed, which was made with the lumberers.

The letter of the 28th of October, 1861, which was written by Mr. Jeffrey, one of the firm of Noad & Co., and which was signed by Patton & Co.'s clerk, is a clear admission of a joint liability by all of these defendants, and there was no disclaimer of liability till January, 1862, when all transactions between the parties were closed.

The agreement of January, 1861, between Patton & Co. and Noad & Co. is a partnership of itself, and will include all the timber supplied by Gunn, Snyder, and MacAdam; for although they contracted before this time to furnish it, they had not in fact furnished it until after this new agreement of January, 1861; it is therefore, of no consequence whether the transactions with these lumberers were strictly, within the first agreement for a partnership in December, 1856. The fact of the plaintiffs having kept the freight accounts with the lumberers personally was fully explained at the trial: it was at Patton & Co.'s request they were so kept and solely for their convenience. The offer to pay the \$12,000 was an additional circumstance of the liability of

these defendants; for it was made unconditionally, and without the reservation afterwards attempted to be attached to it. The finding is clearly against the evidence; and it is submitted that the two agreements between Patton & Co. and Noad & Co., and all the other circumstances, did constitute a partnership, and, therefore, he should not have left to them as a fact to say, whether there was or was not a partnership.

The evidence of James Patton was, also, improperly admitted; for he was a partner, or at any rate a person for whose individual benefit the defence was made, and his name was not endorsed upon the record: *White v. Wycott*, 1 U. C. C. P. 320.

A. WILSON, J., delivered the judgment of the court.

The principal question is, whether these defendants, one of them constituting the former firm of Duncan Patton & Co., and the other two constituting the firm of H. J. Noad & Co., were in partnership, when the claim for freight was earned by the plaintiffs in this action.

If they were, then the next question is, whether the plaintiffs contracted with the defendants or any of them as a partnership, carrying on their business of dealing in lumber, either under the name of Duncan Patton & Co., or under any other name.

If they did, then the plaintiffs are entitled to recover, and there should be a new trial.

If, however, these defendants were not partners, or even if they were partners, if the plaintiffs did not or would not deal with them, but dealt with Gunn and the other lumberers personally, then the verdict has been rightly found and ought not to be disturbed.

It is further contended by the plaintiffs that there has been such a mis-direction by the learned Chief Justice that there must be a new trial, because of the admission of James Patton as a witness for the defendants, whose evidence materially influenced the jury in the conclusion which they came to; and that if this court is of opinion there was a partnership between the defendants, there must also be a

new trial, because it was a question of law whether there was a partnership or not, and should, therefore, have been decided by the Chief Justice at the trial, and not have been left to them to find as a fact.

We think the agreements between Patton & Co. and Gunn, Snyder, and MacAdams, do not constitute a partnership between Patton & Co. and these persons severally. There was no common capital or joint stock, which is often an important circumstance when it is doubtful whether there is a partnership or not, or whether one was intended or not although a joint capital is not of itself an essential portion of a partnership agreement. Nor is there any contribution to be made by these lumberers for any losses which may be sustained ; nor do they properly share in any of the profits. They are bound to manufacture and get out so much timber for Patton & Co.; the cost of it, when it reaches Toronto, is not to exceed eight pence currency, or thereabouts, per cubic foot, and not to exceed ten pence currency or thereabouts, per cubic foot, when delivered at Quebec, provided there is no wreck ; “and on its arrival in Quebec, it is to be taken to account by Patton & Co., who will charge themselves therewith as a sale to themselves, at the rate of one shilling currency per cubic foot, and who will be entitled to a commission of five per cent. out of the proceeds thereof for their trouble and agency in the matter ; and in consideration of the services to be rendered by A. Gunn, the said Duncan Patton & Co. promise to pay him the one-half of the profits, which may be made on the timber, over and above the cost thereof, up to the price of one shilling per foot, the profits to be reckoned after deducting all advances, interest, commissions of sale, and other charges and expenses incurred in the premises.”

So that under no circumstances, excepting as to the elm, oak, and red pine, do the lumberers get more than one-half of the profits between one shilling currency per cubic foot, which is the maximum allowance to be accounted for to them, and the cost of the timber after deducting all advances, interest, commissions of sale, and other charges and expenses ; and under no circumstances do they participate in any the losses further than these losses or charges may encroach

upon or destroy the anticipated or expected difference of any sum less than one shilling per cubic foot, as the total cost of the timber, and the maximum price of it at one shilling per foot.

The whole scope and purpose of the agreements appear to have been to avoid constituting, even constructively, a partnership with the lumberers. The agreement of Gunn's before referred to shews, that he was to manufacture and get out the timber under his own personal care; that it was to be marked G. & P., not as representing Gunn & Patton's timber, but as representing Patton, & Co.'s timber, and not Gunn's; that it was to be Patton & Co.'s property; that it was to be delivered by Gunn to Patton & Co. at Quebec; that Patton & Co. should make Gunn all advances to enable him to manufacture and bring the timber to Quebec; that Gunn was to pay interest on such advances; that Patton & Co. were to take the timber themselves as on a sale at Quebec at one shilling per foot; that in consideration of Gunn's *services*, Patton & Co. were to pay him the half of the profits, if any, between the cost of the timber, after deducting all expenses, and one shilling per cubic foot; and if Gunn should not progress with the manufacture of the timber to the satisfaction of Patton & Co., or should he fail in his agreement in any particular, then Patton & Co. were to be at liberty to discontinue all further advances.

Gunn's position then was merely that of a contractor with Patton & Co., and that contract was one substantially of hiring and service. He was bound to furnish them with so much timber, which was to be their property, the final delivery of which was to be made in Quebec; and to enable him to do this they were to supply him with all the necessary advances in money and provisions, and, in consideration of his *services*, to give him half of the profits, if any, between the cost price in Quebec, after deducting all charges, and the sum of one shilling per cubic foot.

Gunn was in no respect a partner with Patton & Co.: this has been studiously guarded against. He got their capital, he invested it in timber for them, and for his services he was to be remunerated according to an estimated rate, based upon certain anticipated profits, if there happened to be any.

There is here an absence of all community of interest in the general and final result of the enterprise: his claim is bounded to one shilling per foot, however much beyond this may be got for it; he is liable for no losses beyond *that* sum, and he has no interest in or share of the capital or advances made: his whole contribution was his personal services, and for these he was to be paid in a manner which he had specially assented to, and which made him interested, as well as Patton & Co., in getting the timber to Quebec at as low a price as possible.

The case of *Stocker v. Brocklebank* (3 McN. & G. 250) seems, if authority be required, to put this beyond any kind of doubt. There the plaintiff, a patentee, agreed with the defendant, who were partners and the licensees of his patent, to serve them, as manager of their business, at such a salary as should be equal to 40 per cent. of the nett profits: the plaintiff afterwards set up he was a partner with the defendants.

The Lord Chancellor said: "The contract in the express terms one of hiring and service; and the question is, whether, in the absence of every incident of partnership except that of sharing in the profits, that circumstances constitutes a partnership; and I am of opinion, on principle and authority, that it does not. There is nothing in common between the parties—neither capital, liability, nor participation or loss. * * The contract throughout speaks of service, and requires him to obey directions at the peril of a determination of the contract. * * * Whether the plaintiff was to be paid 1 per cent. upon the profits, or 40 per cent., would make no difference on principle; and if the 40 per cent. were but a mode of measuring the amount of wages, salary, or remuneration, I do not think that its being contingent upon profits has any effect in creating a partnership."

And this, I think, disposes also of any question which could arise as to the relation of the parties with respect to the elm, oak, and red pine timber, because the only difference between the provisions of the agreement applying to the two classes of timber is, that the total profits of the last kind were to be divided equally between the parties; but

this mere distribution of profits, as we have seen, is not the only, nor a certain or conclusive, test of the fact of a partnership.

I refer also to the cases of *Wheatcroft et al. v. Hickman* (9 C. B. N. S. 47); *Kilshaw v. Jukes* (9 Jurist. N. S. 1231); and *Re The English and Irish Church Society* (8 L. J. N. S. 724), as containing the latest and most authoritative exposition of the law and principles of partnership.

It has only been necessary to consider this agreement as to its operative effect between Patton & Co. and the respective lumberers, and not as between these parties conjointly and third parties, such as the plaintiffs; because, even if as to such strangers a partnership could be made out, it could have no influence whatever on this suit, inasmuch as the question so presented would be one simply of non-joinder, and that has not been set up here as a defence.

In the construction of this document, too, as between the immediate parties, and presuming that the name of Duncan Patton & Co. did not in such agreement include the other defendants, composing the firm of Noad & Co., we must bear in mind that nearly a year before that time, Patton & Co. and Noad & Co. had, as it is contended, entered into a partnership for the purpose of carrying on just such transactions as those which were subsequently entered into with these lumberers.

So that if such a partnership existed between these defendants, then, as the lumberers did not know Noad & Co., and Noad & Co. did not know the lumberers, when the agreement of November, 1860, was entered into, there could have been no partnership formed in which these lumberers, or any of them, were partners conjointly with all of these defendants.

Both the plaintiffs and defendants admit there was a partnership between the defendants; but the defendants say that that was merely a subsidiary partnership to the principal one between Patton, as the firm of Duncan Patton & Co., and the lumberers; while the plaintiffs say that the subsidiary partnership, if there was one at all, was between Patton and the lumberers, and the principal one between that which was formed between the defendants; or, the

plaintiffs say, that at any rate the partnership must have been between all of the parties, lumberers and defendants.

We think there was, as the parties admit, a partnership formed between the defendants covering these transactions. We think this was the principal partnership, assuming that any other was formed. We think that when Mr. Patton entered into the agreements of November, 1860, with the lumberers, he dealt with them as the agent (whether they knew it or not is of no consequence at present) of the two firms of Patton & Co. and Noad & Co., under their new partnership arrangement of December, 1859, by the name of Duncan Patton & Co., and that there were additional reasons why the agreements of November, 1860, could not constitute a partnership of any kind with the lumberers, so far as these defendants, or any of them, are or is concerned.

We say again, to avoid any such apprehension, that we construe these agreements of November, 1860, so far as they are applicable to the immediate parties, as *inter se*, and not as bearing upon and governing third parties.

We have said that we think a partnership was formed between the two firms of D. Patton & Co. and H. J. Noad & Co.; and we think the agreement has only to be read to be convinced that such was its effect and the intention of the parties.

The agreement states, that the parties had agreed to carry on and enter into certain lumber transactions *on joint account* for three years. Then they provide for having a joint *capital* to carry on such *joint lumber transactions*, and that all advances *on joint account* shall bear interest. Then the cove, for which a rental of £750 at least per annum was to be paid to Patton & Co., and the returns from the use of the cove, were to be *on joint account*; and the rental was to be paid out of the profits of the *joint account*.

Any of the parties, as might be decided on, might contract for furnishing timber for their *joint interest*, and all expenses were to be charged to the *joint account*. The *profits or loss* of the *joint business* were to be divided between the parties in certain proportions. The commissions, charge, and profits accruing from the present *joint account*, or in any way to be derived from the business to be transacted

under this agreement, were to be shared and divided equally. There is also provision for an arbitration in case of any difference in relation to their *joint transactions*.

Then the agreement of January, 1861, provides, that of Gunn's, Snyder's, and MacAdam's accounts, D. Patton & Co. should receive one-third, James Patton one-third, and Noad & Co. one-third.

I think it is impossible to say that the agreement of December, 1859, does not create a partnership: the whole purpose and object of it were to constitute a partnership; and it is not necessary that the very words "partner," or "partnership," should have been used to effect that end: *Greenham v. Gray*, (4 Ir. C. L. Rep. 501).

In *Brett v. Beckwith*, (3 Jur. N. S. 31,) the agreement was, "to take a joint share of your personal underwriting risks effected at Lloyds, paying or receiving sums according to the result of the said accounts." The Master of the Rolls said, "What is the meaning of taking a joint share in a personal risk according to the accounts of any particular transaction, of course assuming it not to be illegal? It is that Beckwith should share the profit and loss in such transaction: that by itself would constitute a partnership."

I entertain no doubt about this being the effect of the agreement of December, 1859. Then the later agreement of January, 1861, left Noad & Co. still with their one-third, share; but it reduced D. Patton & Co.'s share to one-third, and it conferred upon James Patton the other one-third share. This agreement, even if constituting James Patton a partner with the former partners, Patton & Co. and Noad & Co., can make no difference in this suit as to who should be the defendants, because there has been no plea in abatement; and whether any one else is liable or not is now of no consequence, if these defendants are liable.

These defendants we hold, therefore, to have been partners in the transactions in question, and as such partners they have been rightly sued in this action, if the plaintiffs dealt with them and not with the individual lumberers.

We should first, however, dispose of the question of the admissibility or non-admissibility of Jas. Patton's evidence, for his evidence is very material on this point. It appears

from the notes of the trial that he was examined on his *voir dire*. He said: "I have no direct interest in this suit whatever. I have an indirect interest, if my father choose to give me any. I am not a partner in Duncan Patton & Co. If the plaintiffs recover, I may not get any share of the profits: if they do not recover, I may get some of the adventure. If there is a loss I will be liable to contribute with these parties for the loss. I have other transactions with Patton & Co. and Noad & Co. than these, out of which the matter arose, and I may be called on to contribute to their loss if the defendants fail."

Upon this he was admitted as a witness, and was sworn in chief.

In *Hitchcock v. Cronkite*, (15 U. C. Q. B. 157), the Chief Justice was of opinion that the partner of the plaintiff was properly received as a witness, because not being a party to the record the objection to his evidence was reduced to a mere pecuniary interest, which is no longer an objection, and that such an action hardly came within the meaning of the exception of persons therein mentioned.

In *White v. Wycott*, (2 U. C. C. P. 320), one of two partners sued alone for a debt was ruled to be a good witness for his co-partner who was sued, upon the name of the witness being endorsed on the record, under the 7 Wm. IV. ch. 3, and by force of the Statute 12 Vic. ch. 70.

These decisions and the authorities there referred to dispose of this question, and rendered James Patton a competent witness for his co-defendants, as he would have been at the common law upon mutual releases being given: *Wilson v. Hirst*, (4 B. & Ad. 760). Before the passing of these Statutes the plaintiff could always have called the unsued partner of the defendant as a witness: *Blacket v. Weir*, (5 B. & C. 385): *Hall v. Curzon*, (9 B. & C. 646); but the defendant could not have called his own co-partner as a witness for him: *Evans v. Yeatherd*, (2 Bing. 133): *Simons v. Smith*, (R. & M. 29). We, therefore, think James Patton was rightly admitted as a witness for the defendants.

The only remaining question is, to whom was credit given for the freight by the plaintiffs, or with whom did they deal as their debtors or customers? The fact of the plaintiffs

having kept the accounts during the season of carrying in the names of the respective lumberers, is admitted, but it is stated that the accounts were so kept at the request of, and for the convenience of the defendants, for the purpose of enabling them more conveniently to deal and finally settle with these different persons.

The defendants deny this positively, and allege that while they strongly wished the plaintiffs to keep their accounts with themselves in their own name, the plaintiffs refused to do so, and deliberately objected to keep their accounts with Gunn and the others directly. Whichever way this fact may really be, is not absolutely conclusive, although it may be likely to be very instrumental in determining the result *Bottomley v. Nuttall*, (5 C. B. N. S. 122). So far as we can form an opinion from the other circumstances in the case we should be disposed to think the plaintiff's view of it should receive more careful consideration from another jury.

There can be no question that it was the very greatest convenience to all parties concerned dealing with the plaintiffs, that each distinct lot of timber should be separately distinguished, and separate accounts kept concerning it. This was for the benefit of the lumberers, because it enabled them more easily to arrange their respective accounts; and it *was* for the benefit of the defendants, because it enabled them more readily to settle with the lumberers; and it was also for the further benefit of the defendants, by enabling Patton & Co. and Noad & Co. to settle their partnership accounts more satisfactorily among themselves. Accordingly, we find that every stick of timber was to have been marked, not only with the defendants's name, although they were the owners of it, but with the name of the lumberer also; thus, "G. & P.," as representing Gunn the manufacturer, and Patton & Co. the owners. In this manner any stick could be traced from the time of its manufacture till its final appropriation on shipboard, or otherwise, at the port of Quebec.

And we also find that the partnership agreement, of December 1859, between the defendants, provides that Patton & Co. should keep proper books of account, in which

all transactions shall be distinctly and *separately* shewn, &c., which would compel Patton & Co. to keep such large transactions as those with Gunn, Snyder, and MacAdam, not lumped together, but distinctly and separately.

So, again, in the memorandum of partnership dated in January, 1861, it is provided that the accounts carried on by Allen Gunn, Jacob Snyder, Alexander MacAdam, shall be divided in a particular proportion, thus making an additional provision and declaration, that distinct and separate accounts should have been kept with each of these persons. Then, again, the plaintiffs had the lien on all this timber, which they might have enforced unless, and until they were paid the freight. This lien they always exercised in their dealings with Gunn and Snyder with whom they dealt in previous years, and they had never dealt with MacAdam before this year. Why then did they make this important change in their transactions of this year? or would they have been likely to allow their accounts, to the extent of \$16,000, to have accumulated against such persons as these lumberers.

Now with which of the two statements, that made by the plaintiffs, or that made by the defendants, do these accompanying and collateral facts the most agree? We certainly think with that of the plaintiffs' thus casting the direct liability of this freight upon the owners and contractors of the timber, and upon those who were to furnish all the advances for the purpose of carrying it to Quebec. Under these circumstances, the letter of the 28th of October, 1861, written by Mr. Jeffrey, and signed by Duncan Patton, agent, thus bringing both of the firms constituting the partnership in question into direct communication with the plaintiffs upon these very transactions, seems to be quite conclusive.

The defendants by that letter admit that the plaintiffs have drawn three drafts for the three accounts against Gunn, Snyder, and MacAdams. Then they say *before accepting* these drafts they should like a detailed account shewing how those balances arise, when'if upon examination, they are correct, it will be paid or the bills accepted.

It is impossible to reconcile this with the defendants' statement, that the plaintiffs would not deal with the defendants at all, and it does very strongly agree with the plaintiffs' statement, that the three accounts were to be kept distinct and for the defendants' convenience in the names of the lumberers ; but yet that the defendants were to be the debtors and customers of the Railway Company, and were to pay the amounts of these separate accounts as previously liable, while the letters from the plaintiffs to Gunn are quite reconcileable with the fact of the defendants' being the real debtors, because the lumberers were on the spot and could be conveniently applied to by the plaintiffs, and they did in fact, as it was their business, disburse and apply the funds of the defendants in paying all such charges.

There are many other facts which might have been commented on on both sides, but it is unnecessary to do so : we have been obliged, however, to say as much as we have said in order to explain the conclusion we have come to upon this rule.

We think the verdict is very unsatisfactory, and that the case was not properly submitted on either side to the consideration of the learned Chief Justice at the time ; and it could not, therefore, have gone as fully and correctly to the jury as it ought to have done. There was not, in our opinion, any misdirection whatever : the meaning of the writings between these defendants was rightly explained to the jury ; and it was no misdirection that the Chief Justice did not tell the jury, as he was pressed to do, that there was a partnership, or rather three partnerships, formed between these defendants and the different lumberers.

We cannot, however, relieve the plaintiffs except upon the terms of paying the costs of the day. The rule will, therefore, be absolute for a new trial upon the payment of costs by the plaintiffs.

Rule absolute for new trial on payment of costs.

NUDELL ET AL. V. WILLIAMS.

Lease—Renewal—Compensation for improvements—Mode of valuation—Construction of the naked expression "month."

M. leased certain premises to E. for twenty-one years, covenanting that if E., his *executors, administrators, or assigns*, should desire to renew said term (three month's notice having been first given), the rent for the extended period should be fixed by arbitration; that if M. neglected to seal and deliver a new lease upon the terms agreed on, M., his *heirs and assigns*, would pay, or cause to be paid at a fair valuation to E. for all buildings or improvements put upon the premises, excepting those erected at the date of the lease; that if M. neglected or refused to pay within one month for such improvements, the lease should be deemed and considered to be renewed for twenty-one years longer at the same rate as before. M. devised the premises in question to the plaintiffs, or some of them. E. sub-let to H. B. W. reserving a reversion, and subsequently assigned to defendant, having previously, and about three months before its expiration, made a claim in writing for a renewal of the term. Defendant notified the plaintiffs before the expiry of the term of his purchase of the lease, and his readiness to submit to arbitration as to the improvements made during the term. N., one of the plaintiffs, replied on their behalf that the devisees would not renew, and requested defendant to point out the improvements made by E. and defendant, with a view to arbitration if necessary. No improvements of any kind had been made by E. prior to the sub-lease, nor by defendant since the assignment, but all had been done by H. B. W. during his sub-tenancy, he having erected several buildings in addition to those already on the premises. No demand of possession was made other than that contained in the reply to defendant's notice.

Held, on ejectment brought by the plaintiffs, that the refusal by the latter to renew the lease was a refusal to settle a new rent and to execute a new lease, and a discharge to defendant from all necessary precedent acts for that purpose; that this discharge entitled him to compensation for improvements, and to the constructive renewal of the lease on failure of plaintiffs to pay for them; that the improvements to be paid for were not those that might be made by E. *alone*, but by any person claiming under him having the right to make them, and that H. B. W. having had that right, and the improvements made by him not having been paid for by plaintiffs, the lease must be deemed to be renewed, which could only be done by its operating in favor of defendant, the assignee of E.

Held, also, that, the lease not providing for the mode of valuation, the plaintiff might have made it and tendered the amount to defendant, subject to determination by a jury as to its fairness and reasonableness, in case of defendant's refusal to accept it; but that the defendant's omission to have the valuation made gave the plaintiffs no right to eject.

Held, also, that though under the circumstances of the case it might be said that plaintiffs were entitled to the month next after the expiry of the old lease within which to pay for the improvements, and though they had brought their action *within the month*, which must mean a *lunar* month, and would, therefore, have been entitled to a judgment in their favour, if they had had the right of entry during this month, however subject to the restrained from enforcing their judgment on the determination of that right of entry before the execution of a writ of possession; yet, that during this month, or until, at any rate, paid for the improvements, or pending negotiation respecting the improvements, defendant could not be treated as a trespasser; but that he had such an inchoate right in the land, which might be converted into an absolute estate for a further term of twenty-one years, as entitled him to continue in possession, particularly in the absence of any unequivocal demand to deliver up possession, or, at any rate, to enter on 30th June, 1864, the very next day after the commencement of the action; and even if plaintiffs could have maintained ejectment during

the twenty-eight days against the defendant, the subsequent accrued of the latter's legal estate, by the plaintiff's failure to pay, would have related back to the expiration of the lease, as the date of the commencement of the renewed term.

Distinction between a lease of this kind and the ordinary lease, where a renewal is claimable and is claimed, observed upon.

This was an action of ejectment to recover possession of a frame house, messuage or tenement, with the appurtenances, situate on the east side of Yonge Street, in the city of Toronto, together with the yard and garden, 55 feet in front by 208 feet in depth, and the appurtenances thereunto belonging.

The defendant, George J. Williams, appeared and defended for the whole of the premises ; the other defendant did not appear.

The plaintiffs claimed title as the devisees under the last will and testament of John McIntosh, deceased.

The defendant, George J. Williams, besides denying the plaintiffs' title, asserted title in himself by virtue of an indenture of lease, bearing date the 29th of May, 1843, made by the said John McIntosh to one Thomas Elliott, and an assignment of the said lease, bearing date the 23rd of March, 1864, made by the said Thomas Elliott to the said George J. Williams.

The cause was tried before Mr. Justice John Wilson, at the last fall assizes for the city of Toronto, when a verdict was found for the defendant, with leave to the plaintiffs to move to enter a verdict for them, if the court should be of opinion that the plaintiffs, upon the evidence, were entitled to recover.

The following facts were stated and admitted between the parties at the trial :

John McIntosh, on the 29th of May, 1843, demised the premises to Thomas Elliott for twenty-one years from the 1st of June, 1843.

John McIntosh, by his will dated the 19th of July, 1849, devised the premises to the female plaintiffs.

Thomas Elliott, by writing dated the 8th of October, 1845, sub-let the premises to H. B. Williams, the father of the defendant, to hold from the 18th of December, 1845, till the 29th of May, 1864.

Elliott, on the 23rd of March, 1864, assigned the premises to the defendant, and while still lessee of the reversion, and about three months before the end of term, Elliott wrote a letter to the plaintiffs claiming a renewal of the term.

The defendant on the 24th of March, 1864, sent a letter to the plaintiffs, stating that he had purchased the lease and the right of renewal, and that he was prepared for arbitration.

Nudell, on behalf of the plaintiffs, on the 10th of May, 1864, wrote to the defendant, that the devisees had decided not to renew the lease, and requested the defendant to point out what improvements, if any, had been made by Elliott during his tenancy, that the question of their value might, if necessary, be referred to arbitration; and stated that the improvements made by the defendant since the assignment to him would also be the subject of arbitration.

Messrs. Morrison & Sampson, on behalf of the defendant on the 19th of May, 1864, wrote a letter to Messrs. Cameron & McMichael, acting for the plaintiffs, stating that they had been instructed to act for the defendant in procuring a renewal of the lease; that a plan and estimate of the improvements had been made by the defendant and delivered to Nudell; that from the technical grounds Nudell had taken they imagined an arbitration would be necessary to settle the matter; and that they had asked Nudell to name his arbitrator, which request they now repeated, and that they now named Mr. Sheard as the arbitrator for the defendant.

Messrs. Cameron & McMichael, on behalf of the plaintiffs, on the 27th of May, 1864, wrote a letter to Messrs. Morrison & Sampson, the solicitors of the defendant, stating that the request made to the defendant by Nudell in his letter of the 10th inst. was, that the defendant would point out any improvements made by Elliott, and that they did not enquire for those which any person might have put on the place without authority from Elliott, and without being in privity with him; that as soon as any improvements mentioned in the lease had been pointed out, the plaintiffs were prepared to pay for them at a valuation, as named in the lease; and if an arbitration were required to estimate

the value, the plaintiffs would have no difficulty in joining in arbitration; but they were not required by the lease, nor did they feel disposed, to refer to an arbitrator what they (M. & S.) called a technical question, being in reality a question of law, which no arbitrator was competent to decide; that there could be no objection to have the buildings, for which compensation was claimed, valued, and all facts respecting them stated, either in a special case, or by an arbitrator or referee authorized to report the facts, and the opinion of a court of law then taken as to the plaintiffs' liability; that for whatever amount the plaintiffs were really liable, they were willing at once to make compensation.

This suit was commenced on the 29th of June, 1864.

No buildings, erections, or improvements had been made on the place by Elliott prior to the sub-lease, nor by the defendant since the assignment; but all had been made by H. B. Williams during his sub-tenancy, and not by Elliott personally.

There was no arrangement or agreement between H. B. Williams and Elliott relative to the erections, buildings, and improvements, except as appears in this sub-lease.

While H. B. Williams was such sub-lessee he carried on the business of undertaker, cabinet maker, upholsterer, and omnibus proprietor, and for the purposes of such business erected on the premises the buildings marked on the plan put in as new. The buildings originally on the premises were a dwelling house, coach house, and stables. The house was used as a private dwelling house until the premises were leased to H. B. Williams.

There was no demand of possession except as appeared in the notice contained in Nudell's letter of the 10th of May, 1864.

The clause in the lease from McIntosh to Elliott, applicable to the present question, was the following:

"And it is declared and agreed upon between the parties, that if at the expiration of the said term the said Thomas Elliott, his executors, administrators, or assigns, shall be desirous to renew the said term (three month's notice having been first given), the rent, for which such new lease shall be

granted, shall be determined upon by the arbitration of two persons indifferently chosen between the said parties, and if they cannot agree, then by the umpirage of a third party to be chosen by the other two: Provided always, that if the said John McIntosh shall neglect or refuse to seal and deliver such new lease upon the yearly rent and terms agreed upon, that then, in such case, the said John McIntosh, his heirs and assigns, doth hereby agree to pay, or cause to be paid (at a fair valuation), unto the said Thomas Elliott for all buildings, erections, or improvements put up upon the said premises, always excepting such buildings as were standing and erected at the time of leasing the said house and premises; and provided also, that if the said John McIntosh shall neglect or refuse to pay within one month for said new buildings or erections, that then, and in such case, the lease shall be deemed and considered to be renewed for a like term at the same yearly rent as therein is mentioned."

The sub-lease from Elliott contained nothing of any consequence.

The assignment from Elliott to the defendant was not among the exhibits, but it was presumed that it transferred to the defendant all of Elliott's rights.

In Michaelmas Term last *McMichael* obtained a rule *nisi* upon the defendant to shew cause why the verdict for the defendant should not be set aside, and a verdict entered for the plaintiffs pursuant to the leave reserved; or why a new trial should not be had on the ground of the verdict being contrary to law and evidence; and for mis-direction of the learned judge who tried the cause in ruling, that the lease to the defendant or his assignor having expired, the defendant had no longer any estate in the land, and supposing he had any rights, such rights did not give him an estate, and he must apply to equity to have his rights, if any, enforced.

During the present Term, *C. S. Patterson*, with him *D. A. Sampson*, shewed cause.—The plaintiffs claim that on the expiration of the twenty-one years they became entitled to the possession; but this is not the effect of the lease, for it entitles the defendant to retain possession if his improvements be not paid for within the month, and they have not

yet been paid for. This month must be computed from the time of the notice of demand of renewal, or from the time of the plaintiffs' refusal to renew, or from the end of the twenty-one years; and it should rather be computed from the period first mentioned, which would prevent the occurrence of a period of one month after the expiration of the lease, during which time it is difficult to say what the rights of the parties were with respect to the possession.

The plaintiffs had no occasion to require that the defendant should join with them in making a valuation of the improvements: for the lease does not provide that this shall be done. The lease does not say whose improvements are to be paid for; the words are, that McIntosh shall pay unto the said thomas Elliott for all buildings, &c., put up upon the said premises, which must include the defendant as representing Elliott's interest.

The defendant also insists that he was entitled to a demand of possession before action brought, and that no demand has been made upon him.

They referred to *McDonell v. Boulton*, 17 U. C. Q. B. 14; *McQuesten v. Thompson*, II. Err. & App. Rs. 167; *Minshull v. Oakes*, 2 H. & N. 793; *Royers v. Hull Dock Co.*, 10 Jur. N. S. 1245; Tay. Ev. ed. 14.

McMichael, contra.—As the lease provides for payment for improvements to Elliott only, and not to his assignees, no one else can claim compensation; and he could only have claimed it for buildings, &c., which he himself put up; but the admissions shew that Elliott made no improvements whatever; they were all made by H. B. Williams, lessee.

It is not reasonable that the plaintiffs should be required to pay for the buildings, &c., which were put up, for they were of a kind not contemplated by the lessor: he let the place for a private dwelling, while William converted it into a place for carrying on the different businesses of undertaking, omnibus driving, upholstery, and cabinet making.

The defendant cannot be entitled to retain the possession of the premises as a tenant, or *quasi* tenant, till the improvements are paid for, for it is uncertain when the month allowed for payment either begin or ended; and if the defendant be not a tenant, he cannot hold possession adversely

in any other character. The defendant, if entitled to compensation for improvements, may have a remedy in equity, but he is not entitled to hold possession of these premises, as he claims to do.

A. WILSON, J., delivered the judgment of the court.

The defendant claims to be entitled to the possession of the premises in question in this cause, because he has not been paid for the improvements which were made upon them during the term ; or, at any rate, until he is paid for them, or until a demand has been made upon him to leave the possession.

The plaintiffs resist this right of the defendant : they deny his claim to the improvements, because Elliott personally was to have been paid for them, and only for those which he personally made ; and as he never made them, there is no compensation to be paid, and, therefore, no right of retaining possession until payment, or until possession has been demanded.

The agreement is, " that if at the expiration of the term the said Thomas Elliott, *his executors, administrators, or assigns*, shall be desirous to renew the term (three month's notice having been first given), the rent shall be fixed by arbitration: Proved, that if the said *John McIntosh* (not naming his *heirs* or *assigns*), shall neglect or refuse to seal such new lease, that then the said John McIntosh, his heirs and assigns (not saying his *executors* or *administrators*), shall pay unto the said Thomas Elliott, (not saying his *executors, administrators* or *assigns*), for all building, &c., put upon the premises, excepting those which were erected at the time of the lease : And provided, if the said John McIntosh (not saying his *heirs, executors, administrators, or assigns*,) shall neglect or refuse to pay within one month (not saying from what time), then the lease shall be deemed and considered to be renewed."

The option to renew the lease is expressly given to Elliott and to his executors, administrators, or assigns, upon notice being given by them to that effect.

Here it is proved that if McIntosh do not execute the new lease, he, his heirs, or assigns, shall pay Elliott for the

improvements; and if he shall neglect for a month to pay for the same, "then, and in such case, *the lease* shall be deemed and admitted to be renewed for a like term at the same yearly rent as therein is mentioned."

Now, the only person to whom *the lease* can be renewed is the defendant, the assignee of Elliott, who is also the person, and the only person, within the very words of the covenant, who can or could demand the renewal: see *Florence v. Drayson*, (1 C. B. N. S. 584). Is it, however, altogether certain that the defendant can bring his case literally within the terms of this covenant?

The notice for renewal was duly given; but the plaintiffs declined to renew: there was, therefore, no new rent fixed; and there could not, therefore, have been strictly a refusal to execute the "new lease upon the yearly rent and term agreed upon;" nor could there, therefore, have been strictly a liability to pay for the improvements, nor, on refusal to pay for them, could there have been a renewal strictly deemed to have been made. The whole clause after the demand for renewal seems to be based upon a new valuation rent being first made: if this be made, *then* the new lease is to be executed: if it be not executed, *then* the improvements are to be paid for; and if they are not paid for, *then* the lease is to be deemed to be renewed; but no provision is expressly made for the case of a refusal by the lessor, his heirs, or assigns, to fix the valuation rent. It is not said that in such a case the improvements shall be paid for, or that the lease shall be deemed to be renewed; and the question is, whether we can so construe the lease as to give the defendant the same right to specific payment of improvements, or of renewal, when no such valuation rent has been agreed upon, and when the plaintiffs have expressly refused to have any such valuation made at all.

Can it be said that the plaintiffs' refusal to renew before any new rent was fixed, was a "neglect or refusal to seal and deliver such new lease upon the yearly rent and term agreed upon." Or, can such a refusal be set up as a discharge to the defendant from procuring an arbitration to fix the rent, and from tendering the new lease, so as to give to him the same rights at law which he would have had if all

of these acts had been regularly performed? If it can, then, according to the principle of the case of *Cort v. The Ambergate Railway Co.* (17 Q. B. 127), the defendant may be entitled to claim for the improvements, or the constructive renewal for default in paying for them.

The plaintiffs, in answer to the defendant's claim for renewal, say they have decided not to renew, but the improvements would, if necessary, be arbitrated upon. This we think is a refusal to settle a new rent, and to execute a new lease, and a discharge to the defendant from the performance of all acts necessary for that purpose. After this it would have been mere waste of time and labour to have proceeded further with these precedent acts, for after they had been all taken the plaintiffs might still have refused to have given the lease. That the plaintiffs must be liable in damages for refusal to arbitrate upon the rent is very clear; but is this all the defendant's remedy? We are inclined to think, although we are not entirely free from doubt, that, upon proof of this discharge and dispensation, the defendant has become entitled to the compensation for improvements, if there be no literal, or, as it has been called, technical difficulty in his way, and to the constructive renewal on failure of the plaintiffs to pay for them; and we think that on the defendant acquiescing in the waiver of the preliminary arbitration for a renewal, if he had the power to have prevented it, that he has also placed his rights upon his claim for the improvements, or for the constructive renewal of the lease in the lieu of them.

This being so, it is really of no consequence whether the plaintiffs should have paid Elliott individually or not, for they have not paid him; and we think that the improvements, which were to have been paid for, were not the buildings, erections, or improvements put upon the premises by Elliott, for the lease does not say so, but put upon the premises generally by any person who had the right to put them there, as H. B. Williams, while lessee of the premises, unquestionably had; and, as the plaintiffs have not paid for these improvements, the lease must be deemed and considered to be renewed, which can only be done by its being made and operating in favour of the defendant, the assignee of

Elliott. It was then argued that, as the defendant had not had the buildings valued, and even if they had been valued, that as the month, within which the plaintiffs were allowed to have paid for them, before the right to a renewal could attach, had not elapsed after the termination of the old lease and before the commencement of the suit, that the plaintiffs were entitled to recover the possession.

The lease does not provide how this valuation shall be made, and we see no objection to the plaintiffs' making it or having it made by and for themselves, and tendering the amount of it to the defendant; in which case, if the defendant did not accept the amount, it would have been a question for the jury, as in all other analogous cases, to have determined whether it was a fair and reasonable valuation or not. This valuation was not made; but the plaintiff's contend that they had the month next after the expiration of the old lease, within which to tender the value of the buildings, and that if the defendant would have been entitled to have obtained the possession after the expiry of the month, in the event of his not being paid, he had not the right to keep the possession during the month, upon the presumption that he would not be paid; and as this action was brought before the expiry of this month, as the plaintiffs contend, they are now entitled to recover the possession, because they did bring it on the 29th of June; although the defendant may be entitled to recover it back again from them by reason of his right of renewal, which accrued to him on the first day of July, two days afterwards.

One question, therefore, which was raised was, when did this month begin or terminate? The language is, "If Mcintosh shall neglect or refuse to pay within one month;" that is, if he neglected or refuse to pay the fair valuation of the improvements. The improvements had, therefore, first to be valued; but this valuation was not necessary, unless he refused to sign the new lease; and this new lease could not be signed until a valuation rent was fixed, and this could not be done unless the notice to renew was given three months before the expiration of the term.

Now, upon such three month's notice being given, no time was fixed within which the arbitration should be had or ter-

minated ; nor any time within which the new lease should be presented for execution nor any time within which the valuation of the buildings was to be made. We cannot, therefore, say that the plaintiffs were not entitled to the month next after the termination of the old lease within which to pay for the improvements and to avoid the renewal. If this be not the computation of the month, there can be no other period fixed upon in this case, where there has been no arbitration nor valuation had. The plaintiffs have brought their action within this one month, which must mean a *lunar* month ; *Simpson v. Margitson* (11 Q. B. 23,) excluding the 1st of June, 1865, as the anniversary day of the beginning of the term, so that they are entitled to a judgment in their favour if they had the right of entry during this month, although they might be restrained from executing a writ of possession if their right of entry determined before the writ was executed. But we are of opinion that during this month, or until the payment, at any rate, of the value of the buildings, or while the negotiation was going on respecting the improvements, the defendant could not be treated as a wrongdoer ; but that he had such an inchoate right in the land, which might be converted into an absolute estate for a further term of twenty-one years, as justified him remaining in possession of the land, particularly in the absence of any clear and unequivocal demand to deliver up the possession, or at any rate in entering into the land upon the 30th of June, the very day after this action was commenced. We are not at all satisfied that the plaintiffs could have maintained an ejectment at any time within the twenty-eight days against the defendant ; but if they could, we think the subsequent accrual of the defendant's legal estate, by reason of the non-payment by the plaintiffs, would have related back to the time of the expiry of the lease as the time of the commencement of the renewal of the new one.

The case is very distinguishable from the ordinary case, where a renewal is claimable and is claimed. In such a case the mere claim of it will create no estate at law : it will merely confer a cause of action for the refusal to grant it : *Doe avenish v. Moffatt*, (15 Q. B. 257). In this case, if the payment be not made, "the lease shall be deemed and

considered to be renewed for a like term at the same yearly rent," which is a continuation of the original term. We see no difference between a lease of this kind, and a lease for seven, fourteen, or twenty-one years. The one is quite as certain as the other, and the latter is clearly a certain and a continuing term, at the election of the lessee; *Dunn v. Spurrier*, (3 B. & P. 399); *Manchester College v. Trafford*, (2 Show. 31). In our opinion the defendant is now the tenant of a term for twenty-one years under the original lease, commencing at the end of the former term, by reason of the non-payment of the improvements by the plaintiffs within one month after the expiration of that term; and the plaintiff's rule should, therefore, be discharged.

Rule discharged. (a)

MEMORANDA.

During this term the following gentlemen were called to the Bar:—EWAN McEWAN, GEORGE FREDERICK DUGGAN, FREDERICK ARTHUR READ, DONALD MITCHELL McDONALD, THOMAS MACCULLOCH FAIRBAIRN, CHARLES SCOTT, ROBERT VASHON ROGERS, GEORGE KENNEDY, GEORGE AIREY KIRKPATRICK, HENRY HART COYNE, ISAAC FRANCIS TOMS, ROBERT BIRD.

(a) In this case leave has been granted to appeal.

EASTER TERM, 28TH VICTORIA (1865).

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

YOUNG ET AL. V. FLUKE.

Interest agreed upon, however exorbitant, recoverable.

Held following *Howland v. Jennings*, 11 C. P. 272, and *Montgomery v. Boucher*, 14 C. P. 45, that the agreement between the parties fixed the rate of interest recoverable as damages, however exorbitant that rate may be. In this case, therefore, the jury having perversely allowed only ten per cent. per annum, although they at the same time found that the defendant had signed the note or instrument agreeing to pay five per cent. a month, a new trial was granted without costs.

Held, also, that the amount agreed upon was recoverable under the common count for interest and account stated.

The first count of the declaration was on a promissary note, dated 29th August, 1860, for \$178 83, payable two months after the date thereof, with interest at the rate of \$5 for \$100 for each month after the said promissory note should become due until paid.

The second count was the common count for interest on money due, and the account stated.

The claim was \$800.

The defendant pleaded to the first count *non fecit*, and to the second count never indebted.

The cause was taken down for trial before the County Court of the United Counties of Leeds and Grenville in December last pursuant to the order of Mr. Justice JOHN WILSON.

At the trial an instrument in the following form was put in:—

“\$178 83.

“ELGIN, 29th August, 1860.

“Two months after date I promise to pay to Young, Kincaid & Mermian, or bearer, the sum of one hundred and

seventy-eight dollars eight-three cents for value received, with interest at five per cent each month after due till paid.

(Signed) "DAVID FLUKE."

Henry Laishly proved the signing of the instrument by the defendant.

On cross-examination he said, that he drew the note and filled in the interest. He thought it was read over to the defendant, but was not certain. The words about interest were in the note before the defendant signed it. He proved the computation of interest from the time the note was due up to the trial: made the whole amount, adding the principal, \$519 86.

The learned Judge of the County Court charged the jury, that if they believed the defendant made the note they should give their verdict for the plaintiff for \$620 86 (there was an error of \$1 in the addition) on the first count, and for the defendant on the second count; but if they did not believe that the defendant made the note as it was written they should give their verdict for the defendant. The jury found for the plaintiffs \$252 25.

In Hilary Term last a rule *nisi* was obtained on behalf of the plaintiffs, to set aside the verdict and for a new trial without costs, or with costs to abide the event, on the grounds that the verdict was contrary to law and evidence and the Judge's charge, and that it was perverse in this, that the jury improperly and illegally refused to give a verdict for the interest except at the rate of ten per cent. per annum, when the defendant contracted, by the terms of the note or instrument in writing declared on, to pay five per cent. per month; also on the grounds, that the damages found by the said verdict in favour of the plaintiffs were too small.

The rule was enlarged until Easter Term, when *E. Crombie* moved it absolute. No cause was shown against it but on the day of its being moved absolute *S. Richards*, Q. C., stated that he had been written to by defendant's attorney on the subject, and that it had been proposed to allow the verdict to stand if defendant would consent to plaintiff

having full costs ; that the attorney had not been able to communicate with his client, and wished the matter postponed until he could hear from him. The learned counsel also suggested that the instrument set out in the declaration was not a promissory note ; that it was in the form of a promissory note payable two months after date, with an agreement added to it to pay at the rate of five per cent. per month on the amount mentioned in the note *after it was due*.

RICHARDS, C. J., delivered the judgment of the court.

Since the decisions of the cases of *Howland v. Jennings* (11 U. C. C. P. 272) and *Montgomery v. Boucher* (14 U. C. C. P. 45), deciding that the agreement between the parties fixes the proper rate of interest to be charged as damages when interest is given as damages, we must be bound by those decisions until they are reversed.

Whether the instrument declared on is a promissory note or not it undoubtedly fixes the rate of interest, and I have no doubt the plaintiffs would be entitled to recover under the interest count and account stated.

There is no misdirection complained of, and as to the particular finding the verdict certainly seems perverse, though if the jury had found that they were not satisfied that the exorbitant rate of interest mentioned had been agreed to by the defendant, we might not have felt disposed to grant a new trial except on payment of costs. But the jury in effect find that the defendants signed the note as it is, agreeing to pay the rate of interest claimed, but refuse to allow that, apparently fixing for these parties an arbitrary rate of ten per cent., which neither of the parties seem to have agreed to.

Rule absolute for new trial without costs.

BANK OF UPPER CANADA v. OCKERMAN.

Action on promissory note—Accommodation maker—Extension of time to indorser—Pleading.

To a declaration against defendant as maker of a promissory note the defendant pleaded, by way of equitable plea, that for the accommodation of one G. and without consideration he had made his promissory note, which was subsequently by G. indorsed to plaintiffs; that plaintiffs, being the holders of said note with the knowledge that defendant was a mere accommodation maker, took from G. without defendant's knowledge a mortgage on real estate for the amount of said note with others then held by them, and by said mortgage gave time to said G. for payment of the amount secured thereby: that afterwards, in ignorance that time had been so given by plaintiffs to G., he (defendant) several times renewed said note at the request and for the accommodation of said G., and without consideration therefor, all of which was known to plaintiffs; but that as soon as he became aware of the time so given to G. he refused to renew said note; that the note sued on was in truth and in fact for the same sum, and was on a renewal of said note so held by plaintiffs when they took said mortgage from, and gave time to, G., and that by giving said time to G. the position of defendant as against G. was prejudiced and injured, the said G. having been for a long time and being then insolvent, and his (defendant's) recourse against him being thereby defeated and destroyed; that all said acts were done by plaintiffs with the full knowledge that defendant was such accommodation maker, and was in fact only surety for said G., and that he had received no consideration for making said note.

Held, on demurrer, on the authority of *Bailey v. Edwards*, 9 L. T. N. S. 646, plea good, as averring that when they gave time to G. plaintiffs were aware that defendant was only an accommodation maker.

The declaration was on a promissory note for \$1,923, dated 15th February, 1864, made by the defendant payable to the order of Gillespie & Co., and indorsed by the said Gillespie & Co. to the plaintiffs.

Plea, upon equitable grounds, that before the thirteenth day of September, in the year of our Lord one thousand eight hundred and sixty-two, the defendant for the accommodation of one Henry George Gillespie, and without any consideration whatever, made a promissory note for the sum of ———, which said promissory note the said Henry George Gillespie endorsed and delivered to the plaintiffs; that on the said thirteenth day of September, in the year of our Lord one thousand eight hundred and sixty-two, the plaintiffs, then being the holders of the said note, with a full knowledge that the said note was made by the defendant for the accommodation of the said Henry George Gillespie, and without any consideration to him, the defendant, took and received from the said Henry George Gillespie a certain indenture by way of mortgage, under the hand and seal of the said Henry George Gillespie, upon certain real estate in

the said mortgage mentioned, for the amount of the said promissory note with others then held by the said plaintiffs, and on which the said Henry George Gillespie was liable to them as aforesaid; and the plaintiffs gave in and by the said indenture of mortgage time to the said Henry G. Gillespie, that is to say, till the first day of March, in the year of our Lord one thousand eight hundred and sixty-three, to pay five thousand dollars, and till the first day of January, in the year one thousand eight hundred and sixty-four, to pay the sum of seven thousand dollars, with interest on the sum of twelve thousand dollars, at seven per cent. per annum from the date of the said mortgage, the said sum secured thereby; and the taking and receiving of the said indenture of mortgage by the plaintiffs and the giving the said time was without the knowledge and consent or either of the defendant; that afterwards, and without any knowledge of the said time having been given or said mortgage having been taken and received by the plaintiffs as aforesaid, he, the defendant, several times renewed the said promissory note at the request and for the accommodation of the said Henry George Gillespie, and without any consideration whatever for so doing, all of which was well known to the plaintiffs; but that as soon as the defendant became aware of the taking and receiving the said mortgage, and of the giving time to the said Henry George Gillespie by the plaintiffs as aforesaid, he, the defendant, refused to renew the said note or any part thereof; that the promissory note sued upon in this cause is in truth and in fact for the same sum, and is only a renewal of the said note which was so held by the plaintiffs at the time they took and received the said mortgage and gave the said time to the said Henry George Gillespie, and is payable to and endorsed by the said Henry George Gillespie, and that by the taking of the said mortgage and giving the said time by the plaintiffs as aforesaid, the position of the defendant as against the said Henry George Gillespie is prejudiced and injured, the said Henry George Gillespie having been for a long time and still being insolvent, and his, the defendant's, recourse against the said Henry George Gillespie is thereby defeated and destroyed; that all the acts above mentioned were done by the plaintiffs with full knowledge

that the defendant was such accommodation maker of the said note, and was in fact only surety for the said Henry George Gillespie, and that for the making of the said note he never had any consideration.

Demurrer:—1st. That though, as between themselves, the said defendant may have stood in the position of surety for Henry George Gillespie in the pleadings named in the said promissory note in the plea first mentioned, yet it does not appear by the said plea that, so far as regards the plaintiffs, the defendant was to them other than the principal debtor on the said note, or that the plaintiffs ever accepted him or consented to regard him in any other character than that of maker or principal debtor thereon.

2nd. That the character of a surety on said note claimed by the defendant is inconsistent with the terms and form thereof, by which he, the defendant, appears to be the maker and consequently the principal debtor thereon.

3rd. That it does not appear by the said plea that the amount secured by the mortgage therein mentioned was or was not limited to the sum of twelve thousand dollars, for which time was therein alleged to have been given, and it does not, therefore, appear that the amount of the said promissory note formed any part of the said sum of twelve thousand dollars.

A. Kirkpatrick for the demurrer. *J. Bell* contra.

RICHARDS, C. J., delivered the judgment of the court.

On the argument of the demurrer I understood the counsel for the plaintiffs relied principally on the ground, that it does not appear from the plea that at the time the plaintiffs received the note of the defendant for the security of the payment of which the mortgage set out in the plea was taken, that they knew he was signing as a surety; nor is it set out in the plea that they agreed to treat him as a surety. The ground on which this court decided in the *Bank of Upper Canada v. Thomas* (11 U. C. C. P. 515), that the plea did not set up a good defence was, because it did not shew that at the time plaintiff's received the note therein referred to they were aware that defendant had made it for the accommodation of a third party, to whom they had

give time without the defendant's consent. Since that case was decided the point relied on by plaintiffs came up and was expressly decided in *Bailey et al. v. Edwards* (9 L. T. N. S. Q. B. 646, 7, 8). The court held, that if the holder of the bill was aware at the time he gave time to the principal that the bill was only an accommodation bill all the equities of the surety attached, and that by giving time to the principal the accommodation acceptor was released.

We are of opinion on the authority of that case, and the cases in equity therein referred to, which seem to sustain the decision of the court, that the defendant is entitled to judgment on the plea, it having been pleaded by way of equitable defence.

The other grounds taken as exceptions to the plea were not passed in argument, and we do not think it necessary futher to discuss them.

Judgment for defendant on demurrer.

BAGLEY QUI TAM. V. CURTIS.

Justice of the peace—Con. Stats. U. C., ch. 124, secs. 1, 2—Pleading.

In an action against a justice of the peace for a penalty for not returning a conviction to the Quarter Sessions, it is no objection to the declaration that the plaintiff sues for the Receiver General, and not for her Majesty the Queen, inasmuch as suing for a penalty for the Receiver General, for the public uses of the province, is in fact suing for the Queen. Besides Con. Stats. U. C. ch. 124, authorize a party to sue *qui tam* for the Receiver General. *Held*, also, that the defendant, having actually convicted and imposed a fine, could not except to the declaration on the ground that it did not show that he had jurisdiction to convict.

It is not necessary, in averring a conviction, to shew that the complainant prayed the justice to proceed summarily.

The plaintiff sued as well for her Majesty's Receiver General, for the public uses for the province, as for himself, stating that the defendant, being a justice of the peace, did, on the 14th November, 1864, convict the plaintiff, for that the plaintiff did, in the 11th November, 1864, assault and beat one John Whitney, of the township of Percy, and adjudge against said plaintiff that he should pay a fine of \$3, and \$1 85 for costs, on or before the 25th of November, 1864, which, in case of non-payment, was to be levied by distress and sale of plaintiffs goods; and in default of suffi-

cient distress, plaintiff was to be imprisoned twenty days ; whereupon it was defendant's duty to make a return to the next Quarter Sessions ; yet defendant, neglecting his said duty, did not return said conviction, whereupon, by force of the statute, an action had accrued to the plaintiff to demand and receive \$80 from the defendant, as well for himself as for her Majesty's Receiver General, for the public uses of the province.

Demurrer.—First, that the plaintiff does not sue as well for *her Majesty the Queen* as for himself. Second, that the plaintiff is not authorized by law to sue for her Majesty's Receiver General. Third, that it is not alleged that any trial or hearing was had before the defendant in the matter in respect of which the conviction in question was made. Fourth, that it is not shown that the defendant had jurisdiction to convict as alleged, or that the conviction was made under any law giving jurisdiction in the premises, inasmuch as it is not alleged that there was any complaint of the party aggrieved, praying the defendant to proceed summarily under the act in that behalf for the assault in the declaration mentioned.

C. S. Patterson, for the demurrer, cited *Con. Stats. U. C. c. 124*, secs. 1, 2 ; *O'Reilly qui tam. v. Allan*, 11 U. C. R. 411 ; *Keenahan v. Egleson*, 22 U. C. R. 626 ; 1 Wm. Saunders, 135, note 3 ; *Rex v. Eaton*, 2 T. R. 285 ; *Vaughton v. Bradshaw*, 9 C. B. N. S. 103 ; S. C. 7 Jur. N. S. 468 ; *Tunnicliffe v. Tedd*, 5 C. B. 553 ; *Con. Stats. C. ch. 91*, sec. 37.

J. D. Armour, contra, cited *Rex v. Lovet*, 7 T. R. 152 ; 1 Wm. Saunders, 136, note, 1 ; 3 Wm. Saunders, 374, note 1 ; *The Weavers Co. qui tam. v. Forrest* 2 Str. 1232 ; *Donogh qui tam. v. Longworth*, 8 C. P. 437 ; *Regina v. Shaw*, 23 U. C. R. 616.

J. WILSON, J., delivered the judgment of the court.

Cap. 122, s. 1, enacts that "every justice of the peace, before whom any trial or hearing is had under any law giving jurisdiction in the premises, and who convicts and imposes any fine, forfeiture, penalty, or damages upon the defendant, shall make a return thereof in writing under his hand to the next General Quarter Sessions of the Peace, for

the county in which such conviction takes place ;" and, by sec. 2, in case he neglects to make such return, shall forfeit and pay the sum of \$80, together with full costs of suit, to be recovered by any person who sues for the same by action of debt or information in any court of record in Upper Canada, one moiety whereof shall be paid to the party suing, and the other moiety into the hands of her Majesty's Receiver General, to and for the public uses of the province.

To the declaration it is objected, 1st. That the plaintiff does not sue as well for her Majesty the Queen as for himself.

The informer may sue in his own name ; for although it is usual to sue *qui tam*., it is not necessary, unless there has been a contempt of the King : (Com. Digest, Action on Stat. E. 1 ; *The King v. Lovet*, (7 T. R. 162) ; (1 Chit. Pl. 322.) The object in stating the suit as *qui tam* was to show that the informer did not sue for the whole penalty. Where the informer gets all the declaration in debt on a statute is the same as in debt on a contract.

The 17th sub-sec. of sec. 6, Con. Stat. C. cap. 5, refers to the mode of recovering penalties, but permits of any form allowed in such case by the law of that part of the province where the action is brought. The Queen represents the public interests of the province, and the Receiver General is her minister to receive and disburse her revenue here. It will be no overstraining of language in holding, as we do hold, that he who sues for a penalty as well for her Majesty's Receiver General, for the pulic uses of the province, as for himself, sues in fact as well for her Majesty as for himself. The declaration is in form such as has been recently used. The case of *Donogh qui tam. v Longworth* (8 U. C. C. P. 437), was in form.

If the words were struck out the declaration would be good on the old authorities, for here there has been no contempt. They may be rejected as surplusage, for we have now no special demurrer.

This disposes of the second cause of demurrer, for the plaintiff had a right to sue *qui tam* by force of the statute, without any other authority than the statute gave him.

The third and fourth causes of demurrer seem to be based upon a misapprehension as to what really constituted the plaintiff's cause of action. His complaint is that the defendant convicted the plaintiff of an offence over which he had jurisdiction, and imposed a forfeiture, but did not make a return of the conviction. The duty of the magistrate to make a return arises from the fact that he made a conviction, whether right or wrong, and if he neglects his duty to return it, he incurs the penalty. The case of *Keenahan qui tam. v. Egleson* (22 U. C. R), is very much in point. There it was objected in arrest of judgment that the declaration did not show under what law the defendant could convict for an assault, nor that the justice was requested to try the matter of complaint. The Chief Justice said, "It does not lie in the defendant's mouth to say he had no jurisdiction, when he was actually convicted and imposed a fine. As against the defendant, the conviction affords evidence that he claimed and exercised jurisdiction to convict and impose a fine, and, having done so, it became his duty to make a return." The case of *the Queen v. Shaw* (23 U. C. R. 616), is an authority for saying it is not necessary to show in a conviction that the complainant prayed the justice to proceed on the summons. It cannot, therefore, be necessary in averring a conviction, to state more than needs be shewn upon its face.

As to jurisdiction, cap. 91, Con. Stats. C., s. 37, enacts, that "if any person unlawfully assaults or beats any other person, any justice of the peace, upon complaint of the party aggrieved, praying him to proceed summarily under this act, may hear and determine such offence."

But this is the very offence for which the conviction was made, and this gave the defendant jurisdiction. The declaration itself shows a conviction on such a complaint, and therefore it sufficiently appears that the defendant had jurisdiction. We are of opinion the declaration is good. There will be judgment for the plaintiff.

Judgment for plaintiff on demurrer.

SELBY V. ROBINSON.

Lease—Demise by lessee beyond term created—Assignment.

Where lessee of land for five years demised the land for seven years.

Held, that the demise in question operated as an *assignment* of the original term and conferred upon the original lessor, in respect of the privity of estate thus created, a right of action against the assignee of the term for the arrears of rent due under the original lease.

The declaration stated, that the the plaintiff by deed let to one Thomas Selby one acre and a half of the north-west corner of lot No. 11, in the second concession of the township of east Gwillimbury, and seventy-three and a half acres of the easterly part of lot No. 12 in the same concession and township (except as in the deed is excepted) for five years, from the 1st of February, 1861, at the yearly rent of \$190, payable, \$100 on or before the 1st of January and \$90 on the 1st of March in each year during the term; that Thomas Selby covenanted to pay the rent; that he entered and became possessed during the term, and that afterwards, and during the term, all his estates in the seventy-three and a half acres became vested in the defendant by assignment; whereupon the defendant entered and continued possessed from thence hitherto, and paid the rent for a portion of the time since the assignment. That after the assignment, and during the term, and while the defendant was assignee, to wit, on the 1st of March, 1864, a large sum, to wit, \$190, of the rent for one year next before the day last aforesaid became due from the defendant, and still was in arrear, contrary to the covenant aforesaid.

The second count was for use and occupation.

The defendant pleaded to the first count, 1. That he never was assignee as alleged. 2. Payment. 3. To the second count, never indebted.

The cause was tried at the Assizes for York and Peel, held in the fall of 1864, before Mr. Justice John Wilson, then a verdict was found for the plaintiffs and \$223 damages.

In Michaelmas Term last *McMichael* obtained a rule *nisi*, calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved, or a new trial be had between the parties, on the ground that the verdict was contrary to law and evidence; for that there was no privity between the plaintiff

and the defendant to sustain the action; and for the misdirection of the learned Judge in directing that the lease from Thomas Selby to the defendant was not an underlease, but an assignment:

1. Because it did not convey the whole interest; and, 2. Because it created a longer term, and it could not, in creating a longer term, be merely the assignment of a shorter term; and having been created with the consent and authority of the plaintiff he could not now annul it.

Or why a new trial should not be granted, because the damages were excessive, being more than the year's rent claimed, and on affidavits filed; or why the verdict should not be reduced to \$193 on leave reserved.

At the trial the lease mentioned in the declaration was put in and proved. Then a lease was put in made the 22nd of October, 1860, between Thomas Selby, of the first part, and Wm. Robinson, of the second part, by which Thomas Selby demised and leased to Wm. Robinson that parcel of land containing by admeasurement about seventy-three acres, being composed of the easterly three-fourths of the east half of lot No. 12 in the second concession of East Gwillimbury, from the first of April, 1861, for seven years, at the yearly rent of £57, by equal payments, on the first days of January and April in each year during the term, the first payment to be made on the 1st of January, 1862.

It appeared that Thomas Selby, who is a brother of Wellington, the plaintiff, acted as the plaintiff's agent in collecting rents, and that the plaintiff authorised Thomas to make the lease to the defendant for two years longer than he (Thomas) himself held it from the plaintiff, as the plaintiff was going to the west and Thomas was to collect the rent; and that the defendant knew Thomas was acting for the plaintiff who was in fact the landlord.

It was contended by the defendant's counsel, that the plaintiff must fail, because the lease from Thomas Selby to the defendant was an under-lease not an assignment; that there was no privity between the plaintiff and the defendant, for the plaintiff stood by and allowed Thomas Selby to deal

with the land, by leasing it to the defendant, as Thomas Selby's own property, for a longer term than Thomas had in the land.

There was also some dispute as to whether a payment which had been made by the defendant to Thomas Selby on the 30th of December, 1863, was in full of the rent to the 1st of January, 1864, or was only for the rent which was due up to the first of April, 1863. Thomas Selby stated positively it was only for the rent which was then past due, that is, up to the 1st of April, 1863.

The defendant's counsel had leave reserved to him with respect to the effect of this second lease, and to reduce the verdict to 193, if the court should see fit to do so upon the evidence.

Robert A. Harrison now shewed cause.

The instrument of 22nd October, 1860, although conveying part only of the land demised by the lease of 1st Feb'y, 1861, and although for a longer time than the previous lease created, is nevertheless an assignment: *Holford v. Hatch*, 1 Doug. 183; *Congham v. King*, Cro. Car. 221; *Care v. Cator*, Cow. 766; *Curtis v. Spitty*, 1 B. N. C. 656; *Gramon v. Vernon*, 2 Lev. 231. He also referred to *Palmer v. Edwards*, Doug. 187, note; *Merceron v. Downson*, 5 B. & C. 479; *Heap v. Livengstone*, 11 M. & W. 896; *Elec. Tel. Co. v. Moore*, 2 F. & F. 263; *Woodfall*, L. & T., 8 ed. 302; Aach. L. & T. 2nd ed. 73.

McMicheal supported the rule.—The conveyance of the 22nd October, being made with the assent of the plaintiff, is in fact a new lease, covering the very period of the term which had been created by the plaintiff, and therefore put an end to the lease which he had made himself, which was no longer consistent with it,—he is bound by estoppel; *airncross v. Limber*, 7 Jur. N. S. 149. If not a new lease it was an under lease, and the plaintiff cannot sue upon it: *Pollock v. Stacy*, 10 Q. B. 1033; *Ozley v. James*, 13 M. & W. 209. He also cited *Feeman v. Cooker*, 2 Ex. 154; *Packard v. Sears*, 6 A. & E. 469.

A. WILSON, J., delivered the judgment of the court.

In *Holford v. Hatch* it was decided that the lessee having conveyed his interest to the defendant for a day, or some days less than his own term, such conveyance was an under lease, and that an action could not be maintained by the original lessor unless against an assignee of the whole term.

Congham v. King shews that covenant, at the suit of the original lessor, will lie against an assignee of part of the thing demised. *Twynam v. Pickard* (2 B. & Al. 105), *Badeley v. Vigurs* (4 E. & B. 71), is to the same point; and so also is the old case in 2 Lev. 231. *Hare and Cator*, and *Curtis v. Spitty*, show that on an averment that the whole interest of the lessee came to the assignee, it would be a fatal variance, on a traverse of the assignment, if it appeared that the assignment was of parcel only of the land originally demised.

The case of *Baker v. Gostling*, report also in 1 B. N. C. 19, was that the plaintiff's testator had a term for thirty-one years from Christmas, 1823 which it was said he under-leased to the defendant for thirty years from 29th September, 1825 the defendant covenanting to pay his lessor an accrued rent. In an action of covenant which was brought for the rent it was argued for the defendant that as the under-lease, as it was called, was for for a longer period than the under-lessor's own term had no reversion, and could not properly claim rent unless by estoppel; and that as the lessor was dead the estoppel would not operate in favour of his executors. The court held the executors of the under-lessor could sue for the rent, and that the instrument was a demise and not an assignment.

In *Preece v. Corrie* (5 Bing. 24) it was held that a tenant whose interest expired on the 11th of November, 1826, and who let his term for the whole of that term, had made a demise and not an assignment, and that although he could not distrain, because he had no reversion, yet he could sue for the rent which was reserved to himself.

In *Poultney v. Holmes* (Str. 405), a transfer by the lessee of his whole interest, reserving rent to himself, was also held to be a lease and not an assignment.

In *Pollock v. Stacy* (9 C. B. 1033), a demise by one of the whole of his term, reserving rent to himself, was held to be a lease and not an assignment, the parties intending to create the relation of landlord and tenant between themselves.

In every one of these cases the action was between the immediate parties to the contract, and there was no reason as regarded themselves why their contracts should not have had full operation as they had intended them to operate. But when third persons are concerned, the rights of such others must be governed by the legal effect of the acts that have been done. Now the general rule is, that if there be lessor and lessee for a term, and the lessee convey all his term or more than his term, so that he has no reversion, that this is an assignment so far as the original lessor is concerned: *Palmer v. Edwards* (1 Doug. 187 note 59).

In *Woolaston v. Hakewell* (3 M. & G. 372), Tindal, J., said, in a case similar to the present, a longer lease made by one claiming under the original lessee than the original lessee himself had, and at a higher rent: "The excess of the rent beyond that originally reserved may be a *rent seck* only, but there is no ground for holding that the transfer of the whole term will not upon that account be an assignment. The only question, therefore, is whether if lessee for ninety-nine years demise for a long time, such demise operates in law as an assignment: and we entertain no doubt but that for a very long period the law has been held that it has that operation, and may be so treated in pleading." And he referred to *Hicks v. Downing* (1 Ld. Ray. 99), where it is said: "So if lessee for three years assigns his term for four years, he does not by this gain any tortious reversion, and it does but amount to an assignment of his interest." And it would appear from a note in 3 M. & G. 393, (note a), that the demise or assignment being void for the excess would pass only the lessee's *interest*, which is the general doctrine, that when an *interest* passes there can be no estoppel so that all beyond the interest would be merely void.

The case of *Williams v. Hayward* (El. & El. 1040) has no special application to this case, but it may be profitably referred to.

We consider, therefore, that, as respects the plaintiff, the original lessor, the legal effect of the conveyance by Thomas Selby to the defendant was to make the defendant the assignee of the term granted to Thomas Selby, and to confer upon the plaintiff, in respect of the privity of the estate thus created, a right of action against the defendant for the arrears of rent which are claimed in this action.

The rule will, therefore, be discharged.

Rule discharged.

RUSSELL V. FRASER.

Search for lost deed, what sufficient to admit of secondary evidence—Memorial executed by grantor, good evidence against third parties.

In the case of lost deeds it is always a question for the presiding judge whether sufficient search has been made to justify the admission of secondary evidence as to their contents.

In this case the witness, who was a son of the late agent of one of the grantors, stated that his father had possession of all the papers of the grantor relating to lands in Upper Canada; that he had searched through his father's papers and the papers of the grantor, all of which were then in the possession of himself and mother; that, at the suggestion of the executors of the said grantor, another person had searched among those of his papers deposited in a certain bank, as well as elsewhere amongst his private papers, but that he had not applied to the heirs or devisees of the grantor, though he had made every other inquiry where there was a probability of his finding the deeds in question; nor had he searched among the papers of the other grantor, because he was a bankrupt, and the grantor amongst whose papers he had already searched was his assignee.

Held, sufficient to justify the admission of secondary evidence as to the deeds in question.

Held, also, that a memorial twenty-five years old, which a witness stated he believed to be signed by the deceased grantor in the deed, basing his belief on the fact that the signature closely resembled his handwriting which he had seen in the books and papers belonging to him in his (the witness') charge, though he had never seen him write, and the signatures of the witnesses to which memorial, one of whom was dead, and the other out of the jurisdiction, he knew; or a memorial, upwards of thirty years old, produced by the deputy registrar from the registry office, and signed by the grantor in the deed, reciting the deed and its contents;—is good evidence of the execution of the deed; in the latter case either as affording secondary evidence of its contents, which would be good against all the world, or as a declaration or admission under seal by the owner of the fee, when in possession, that he had sold and conveyed to the grantee.

Seemle, that in the former case proof of the handwriting of the grantor alone would have been sufficient evidence.

Held, also, that a memorial signed by the grantor is evidence not merely against the grantor and all claiming under or in privity with him, but against third parties also, as being a statement and act by the party in possession against his own interest as the reputed owner of the land in question.

Quære, whether this would be so if it appeared that the land was at the time in the actual possession of some one other than the grantor and not holding in privity with him.

This was an action of ejectment to recover possession of lot number three in the ninth concession of the township of Rawdon, in the county of Hastings.

Mary Fraser and Hugh Fraser, on 27th of February, 1863, appeared to the writ and defended for the whole of the land.

The plaintiff by this notice claimed title by virtue of a deed of bargain and sale from the Hon. Peter McGill to him. The defendants by their notice besides denying the title of the claimants in the lands, asserted title in themselves by continued possession for twenty years and upwards.

The cause was taken down to trial at the last fall assizes at Belleville, before the Hon. Mr. Justice Morrison.

The plaintiff put in an exemplification of a patent to David Parks, of the lot in question, dated 4th September, 1800, and proved the signature of the grantor to the deed from Hon. Peter McGill to plaintiff of the lot in question. The witness further proved that his father was a half brother of the Hon. Peter McGill, and the land business of the late Hon. Peter McGill was under his management, and all the papers relating to lands in Upper Canada were in the possession of his father, who was then dead; that he had searched amongst all the private papers of his father and all the papers of the McGill estate, and could not find any of the deeds that plaintiff wished to adduce in evidence. He added that some of the papers of the McGill estate had been sent to Mr. Court of Montreal, who had returned them to him, the witness. The witness' father was the acting executor of Mr. McGill for the Upper Canada property. The executors of the late Mr. McGill were, Mr. Anderson, Mr. Green-shields, and a solicitor and the father of the witness, and all the papers of Mr. McGill's estate relative to lands in Upper Canada were in the possession of the witness and his mother. He searched for a deed from Parks and his wife to John McKenzie, dated the 27th March, 1829, and from McKenzie to Hon. Peter McGill, dated the 18th of March, 1840, and could not find them amongst the papers of the estate of the Hon. Peter McGill, or of those of his father.

Another witness searched for the same deeds from Parks to McKenzie, and from McKenzie to McGill, amongst the papers of Hector Russell, whose agent he was. He also searched amongst the papers of the firm of Hector Russell & Co., whose agent he also was. He also searched at the bank of Montreal, at the suggestion of Mr. Greenshields, one of Mr. McGill's executors, amongst his (McGill's) papers in the bank, and did not find the deeds on any of them there. He also searched amongst the private papers of Mr. McGill, in the possession of Mr. Craig, and did not find any such deeds in any of the searches. The witness added there were no other places in which he could search with a probability of finding the papers: he spent several days in looking after the deeds. On cross-examination the witness said he did not apply to Hector Russell, but he believed he had all his papers in Canada, and that he made no application to Mr. McGill's heirs or devisees. The reason why he did not search amongst McKenzie's papers was, that his estate was transferred to an assignee, he being a bankrupt, and Mr. McGill was the assignee: there was no use to search elsewhere for the papers. He looked at a memorial of a deed, dated the 18th March, 1840, purporting to be from John McKenzie to Hon. Peter McGill of the lot in question: he had seen the handwriting of Mr. McKenzie, and believed the signature to the memorial to be his handwriting. He also knew the two witnesses to the memorial, and the signatures were of their handwriting respectively: one was dead and the other living in Montreal. He had seen the handwriting of McKenzie in his own books: the writing there closely resembled the signature to the memorial, and he believed it was his, though he never saw him write.

The deputy registrar of the county of Hastings produced the original memorial of a deed from David Parker and wife to John McKenzie of the lot in question, dated 27th March, 1829. He produced another memorial and both were put in.

Notice to produce the deeds in question was served on defendants and service admitted.

For the defendants it was objected, that there was no evidence of the execution of any deed to McKenzie by

Parks, and no search amongst McKenzie's papers for such a deed, sufficient to let in secondary evidence of its contents; that there was no evidence of the execution of a deed from McKenzie to Hon. Peter McGill, and no proper search to allow secondary evidence; and, as secondary evidence, the memorial to the latter was not proven.

The learned judge directed a verdict for the plaintiff, with leave reserved to the defendant to enter a nonsuit, if the court on the evidence should so direct.

In Michaelmas Term last, *Wallbridge*, Q. C., pursuant to leave reserved, obtained a rule *nisi* to enter a nonsuit on the grounds, that there was no legal proof of the supposed deed from Parks to McKenzie in the plaintiff's chain of title, or of the execution of such a deed; that there was no legal proof of the deed from McKenzie to the Hon. Peter McGill, and that there was no proof of search with the heirs or devisees of the Hon. Peter McGill for the missing deeds, or of search with McKenzie for the deed from Parks to him.

This rule was enlarged until Hilary Term last, when *Dixon* shewed cause.—There was no reason to suppose that the deed would be found on searching with the heirs or devisees of Mr. McGill, as the property was conveyed by him before his death, and all the papers connected with his lands in Upper Canada were in the hands of Mr. McCutcheon. There was no reasonable ground for searching with the heirs or devisees of Mr. McGill. As to John McKenzie, his estate having gone into bankruptcy, the search was proper with his assignee. The objection taken to the admission of the memorials as secondary evidence was that the memorials themselves were not proven: not that they did not, if properly proven, afford evidence that the deeds were executed. The objection now taken is, that even admitting they are properly proven, they do not prove the deeds. The objection not having been properly taken at *nisi prius* cannot now be urged here: *Williams v. Wilcox*, 8 A. & E. 314. There was reasonable search for the deeds to let in secondary evidence, and it was for the judge to decide if he was satisfied that the originals were not improperly withheld: *Taylor on Evidence*, secs. 22 & 399.

The memorials in this case are signed by the grantors, and are therefore properly receivable in evidence, either as primary evidence, being the declarations of the parties who were the owners of the premises, that they had conveyed them, or secondary evidence, binding all in privity with them; and also as binding those persons not shown to have been in possession when these memorials were signed, inasmuch as the persons to whom the land was conveyed would be presumed to be in possession until some one else was shewn to have been so in possession: *Rex v. Stourbridge*, 2 M. & R. 43, 46; *Gulley v. Bp. Rexter*, 4 Bing. 290; *Pardoe v. Price*, 13 M. & W. 267; *Marvin v. Hales*, 6 U. C. C. P. 208; *Lynch v. O'Hara*, 6 U. C. C. P. 259; *Anlsey v. Breo*, 14 U. C. C. P. 371; *Gough v. McBride*, 10 U. C. C. P. 166; *Tiffany v. McCumber*, 13 U. C. Q. B. 159; *Regina v. Inhabitants of Kenilworth*, 7 U. C. Q. B. 642; *Gray v. McMillan*, 5 U. C. C. P. 400. The memorials are declarations against the interest of the parties signing them, and are good primary evidence of statements made by the owners of the estate that they had conveyed them. In the event of the court not supporting the views of the plaintiff here presented he desired a new trial, as he might possibly be able to supply the deficiencies in his case. He further referred to Taylor on Evidence, 156; *Doe Earl of Ashburnham v. Michael*, 17 Q. B. 277; *Wynne v. Tyrwhit*, 4 B. & Ald. 376; *Bartlett v. Smith*, 11 M. & W. 483; *Doe Mudd v. Suckermore*, 5 A. & E. 703, as to proof of handwriting; *Slatterie v. Pooley*, 6 M. & W. 664.

English, contra.—The defendants dare not claim in privity with the grantors in either of the deeds, and is not in any way bound by their admissions. The statements or admissions in the memorials are not any answer against the defendants in this action. The production or proof of a memorial thirty years old does not necessarily prove a deed of that age. There was no proper evidence of McKenzie's handwriting to the memorial. The other subscribing witness to the memorial could have been called to prove it: he could have been subpoenaed from Lower Canada, and should have been called. Mr. McCutcheon, the witness, never saw the deeds, and his evidence in relation to them and the search

made for them were not satisfactory. He was in no position to state what was done as to sending them to his father, or to Montreal: *Smith v. Nevilles* 18 U. C. Q. B. 473.

RICHARDS, C. J., delivered the judgment of the court.

As to the first question raised, the sufficiency of the search for the lost deeds to let in secondary evidence of their contents.—in *Reg. v. The Inhabitants of Kenilworth* (7 Q. B. at p. 642,) Lord Denman, in reference to a general rule established as to what is a sufficient search to let in secondary evidence said: “I think that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the court before which the trial is had that, to use the words of Baily Justice, in *Rex. v. Denis*, ‘a *bona fide* and diligent search was made for the instrument where it was likely to be found.’ But this is a question much fitter for the court which tries than for us. They have to determine whether the evidence is satisfactory, whether the search has been *bona fide*, whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such questions are to be brought before us as matters of law? The court below must exercise their own judgment as to the reasonableness of the search, taking into consideration the nature of the instrument, the time elapsed, and numerous other circumstances, which must vary with every case.”

As to the diligence in the search necessary to let in secondary evidence, the following quotation from Taylor on Evidence seems to lay down the proper principles to be acted on by the courts: “What degree of diligence is necessary in the search cannot easily be defined, as each case must depend much on its own peculiar circumstances; but the party is generally expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a

preliminary enquiry addressed to the discretion of the judge, the party offering secondary evidence need not on ordinary occasions have made a search for the original document as for stolen goods, nor be in a position to negative every possibility of its having been kept back."

The latest case I have met with on this subject is *Reg v. Hinckley* (8 L. Times. N. S. 270). I will make a short extract from the judgment of Mr. Justice Blackburn in that case. He said: "I think the only question is, if sufficient search has been made for the original. Now to determine this, must be shown that search has been made where the instrument would most probably be. It is for the presiding judge to decide whether reasonable evidence has been given to satisfy his mind that the document has been lost. But it is also a mixed question of law and fact which the court can subsequently review."

We think there was reasonable ground laid for the admission of the secondary evidence of the contents of the lost deeds. There is no reason to suppose that they were intentionally kept back by the plaintiff. Two hundred acres of wild land in the township of Rawdon, where the title appeared to be registered, was not considered to be of such value by the assignee of a bankrupt estate as to induce us to think that any extraordinary care would be taken to preserve the title deed. The indifference exhibited by persons who owned large quantities of wild lands in the early settlement of this Province, and who were in the habit of frequently buying and selling lands, to the preservation of the title deeds, in a matter which could hardly fail to have excited the attention of all who have had practical acquaintance with the business of the country. This indifference has continued to be observed to a greater or less extent until within the last fifteen or twenty years. The non-production of or inability to find the title deeds to a two hundred acre lot, where the title was registered, to produce them on a trial of the cause, would hardly excite a suspicion that such deeds were intentionally kept back. Reasonable search and enquiry with and amongst the papers of those likely to have had the deeds sought for seems to us to have been made, and we cannot say the judge in admi-

ing secondary evidence to be given of the contents of these deeds has wrongly exercised his discretion.

In Taylor on Evidence, ed. 1 p. 369, it is laid down, "If the instrument be destroyed or lost, the party seeking to give secondary evidence of its contents must give some evidence that the original once existed, and must then either prove its destruction or establish its loss."

I think the production of a memorial thirty years old, signed by the grantor in the deed, reciting the deed and its contents, is some evidence of the existence of the conveyance from Parks to John McKenzie, dated 27th March, 1829. Having giving my best consideration to the subject, I have arrived at the conclusion that this memorial, signed by the grantor, is evidence of the execution of the deed, either as affording secondary evidence of its contents, which would make it evidence against all the world, or as a declaration or admission under seal by the owner of the fee at a time when he was in possession of the land, that he had sold and conveyed it to John McKenzie.

An instrument like this, coming from the custody of a public officer, who must have seen the deed itself to which it refers, is entitled to more credit than if it had been in the possession of the party to whom the land was said to have been conveyed, though that person might have had possession of the land. The instrument in the possession of the person holding the land might have been forged or obtained by fraud: but when delivered to a public officer, proved under oath, deposited and kept by him for thirty years, and registered in a book open to constant enquiry and inspection, the instrument has higher claims to our confidence in its genuineness. It is surely entitled to as much credit as a mere abstract of title would be.

Then as to the conveyance from John McKenzie to Peter McGill, this memorial was not executed thirty years since, but still of it considerable antiquity, being over twenty-five years since it was executed. The signature of Mr. McKenzie is proved by the evidence of the person who has had charge of the books and papers of the estate with which Mr. McKenzie in his lifetime was connected, and who thus was enabled to obtain a knowledge of his handwriting, though

he never saw him write. I think this evidence would be sufficient to prove the signing of the deed by McKenzie, he being now dead; but the further proof of the signature of the subscribing witness to the memorial makes the proof of that document complete, one of the witnesses being dead and the other residing out of the limits of Upper Canada.

This memorial proves the execution of the deed from McKenzie to McGill, in the same way as the other memorial proves the execution of the deed from Park to McKenzie.

The observations of Sir J. B. Robinson, in *Smith v. Nevilles* (18 U. C. Q. B. Rep. 473), are in favor of the memorials being good secondary evidence of the execution of the deeds when the non-production of the originals was satisfactorily accounted for. The able judgment of Mr. Justice Hagarty, in *Gough v. McBride* (10 U. C. C. P. 166), where many of the most important cases on the subject of the evidence of memorials of registered deeds are referred to, only decides that when the memorial is signed by the grantee, and possession does not follow and accompany the deed, the memorial is not evidence of the execution of the deed against any but those claiming through the grantee.

It seems to be admitted beyond reasonable doubt, that when the memorial is signed by the grantor, it is evidence against him and all claiming under him, but not as against third parties. It is urged that the defendant does not claim in privity with either of the deeds, and therefore may set up that the plaintiff has not established the transfer of the fee of the land from the owner to himself.

What right has the defendant to take this ground? The heir-at-law, or assignee of the owner of the fee, could not show, as a matter of fact, that there was no such conveyance, or that it was inoperative, because they would be estopped from showing the truth; but, nevertheless, against the declaration of those persons under whom they claim, the statement by the owner or party in possession of land against his own interest, when accompanied by acts or something done, is evidence to go to a jury as against every one in relation to the title or right to possession, not merely on account of privity with those who may subsequently claim, but as the acts and conduct of the reputed owner.

Now here the grant from the Crown to Parks, in 1800, would transfer the possession to him. In the absence of evidence to the contrary he remained in possession until the 27th March, 1829. He then signs an instrument under his seal, declaring that for a good consideration he had conveyed the land in fee to John McKenzie, and requests that the instrument declaring that fact shall be registered by a public officer in a book for that purpose, and that officer cannot properly enregister the memorial unless the deed to which it refers is produced. To use the language of Lord St. Leonards, in *Biggs v. Sadlier* (10 Irish Equity Rep. 522), "I confess I should be ashamed of the law of England if such evidence as that could not be received from necessity as secondary evidence," to prove the contents and execution of the deed, when there was nothing to show there was any one in possession of the lot, or claiming in any way adversely to the grantor. This deed proved in this way under the statute, passed the possession to John McKenzie, and he, we must assume for the purposes of this suit, remained in possession (no one else being in possession) until the 18th March, 1840, when he signed a similar memorial, declaring under his seal that he had conveyed the land to Mr. McGill. The effect of this memorial, enregistered according to law, and proved as this was, in my humble judgment was to furnish evidence of the conveyance from McKenzie to McGill, and the effect of that conveyance was to transfer the possession to him. The conveyance from McGill to plaintiff is fully established.

If at the time of the execution of the memorials it could have been shown that the land was in the actual possession of some persons other than the grantors, and not holding in privity with them, it might be argued that the signing of the memorial and requesting it to be registered under such circumstances, was not the act of a party in possession of the land either actively or constructively, and therefore could not prejudice the party who was then in actual possession. However that might be, such is not shewn to be the case here; and I think, both by reason and authority, we may sustain the plaintiff's right to recover against persons who do not appear to have any title to the land whatever, except

a bare possession, and that not for a period long enough to give them a title.

I have looked at several cases not referred to in the judgment of Mr. Justice Hagarty. In *Cathrow v. Eade* (4 DeGex and Smales, 531), in relation to a memorial signed by the grantor, the Vice-Chancellor said, "I think this memorial is admissible in evidence on more grounds than one, but at least on one: Mary Davies, by whom it is executed, is dead, and it is a document signed and sealed by her against her own interest. That is sufficient evidence, the deed being lost, of the date of the conveyance to the testator." That was the point to be determined in that suit, and the decision affected the rights of parties not sustaining their claim by the deed.

In *Moulton v. Edmonds* (29 L. J. Ch. p. 181), the Lord Chancellor held, that recitals in deeds where evidence on the loss being proved. He said, "Recitals, generally speaking, are only evidence between the parties to the deeds containing the recitals. Authorities, however, have been cited to show that in case of title recitals have been received as evidence of missing deeds. In *Moriarty v. Grey* (12 Irish C. L. Rep. 129), Patrick Grey, who was then tenant in tail, executed a disentailing deed on the 22nd October, 1834, through which the plaintiff claimed. After the proper evidence of loss was given, the plaintiff tendered in evidence a memorial of the deed of 1834, which memorial was proved to have been executed by Patrick Grey. The learned judge admitted the memorial in evidence. The defendant moved for a nonsuit, on the ground that the memorial was not good secondary evidence of the alleged deed of October, 1834, and further, because there was no sufficient legal proof that such deed had been executed by Patrick Grey. The defendant did not claim in privity with Patrick Grey. The full court held, as there was sufficient evidence of the loss of the deed, the memorial as secondary evidence was properly admitted in evidence, and refused to grant the nonsuit. *Piggott v. Stratton* (1 DeG. S. & J. 33—49), and *Cairncross v. Lormer*, 3 McQ., H. L. Cases, 829; 7 Jur. N. S. 149), are also authorities in favour of plaintiffs. *Nash*

v. Ash (8 J. N. S. 998), and *Andrew v. Motley* (12 C. B. N. S. 514), we have also seen, but do not consider them as conflicting with our views in this case.

We think the rule to enter a nonsuit must be discharged.

Rule discharged.

ROBINSON v. SHIELDS:

Wrongful distress—Variance between direction and evidence—Condonation—
2 Wm. & M., ch. 5, sec. 5—*Pleading.*

In an action by a tenant against his landlord for a wrongful distress and sale of his goods the gist of the action is the wrong complained of, and therefore a variance between the contract set out in the declaration and that proved is immaterial.

Quære as to the right of a landlord to distain and sell his tenant's good for the nonfulfillment of a contract respecting certain rails agreed to be delivered in lieu of rent for the demised premises.

Held, also, that the receipt by the tenant from the bailiff of the surplus of the proceeds of the sale was no condonation of the tortious act complained of, the payment having been neither made nor accepted in satisfaction or compromise of the injury suffered.

In such an action it is necessary to state correctly to whom the rent is due. "Not guilty" puts in issue the tenancy and the township of the goods.

Semble, that it is improper to join with a cause of action of this nature a count for the seizure and the conversion of the goods.

This was an action tried before Hagarty, J., on the statute 2 W. & M., cap. 5, sec. 5, for unlawfully distraining for \$100, being one year's rent claimed to be due from the plaintiff on the 1st day of April, 1864, on the east half of lot number six in the seventh concession of the Township of Albion, when in fact no rent was due.

In the first count of the declaration the plaintiff alleged that he held the said lot as tenant to one William Shields, since deceased, on the terms that he should, as rent for the first year, furnish pine or cedar rails for fences to be put by him on the premises by or during the second winter of the tenancy, and should hold it thereafter at a certain rent per cleared acre therefor, payable by the plaintiff to said William Shields; that after the commencement of the tenancy Wm. Shields died, and the plaintiff thereafter held the lands on the said terms as tenant of the defendant, who claimed the reversion; yet the defendant, not regarding the statute, on the 27th day of September, 1864, wrongfully distrained in

and upon the premises, the goods of the plaintiff of the value of \$180 94, and on the 3rd day of October, in the same year, sold the same goods by colour of the statute for rent then pretended by the defendant to be in arrear by and due from the plaintiff, when in truth and fact no rent was due.

In the second count the plaintiff alleged that the defendant seized his goods, carried them away, and disposed of them to his own use.

The defendant pleaded not guilty by statute to both counts

John Rogers was called by the plaintiff to prove the agreement. He represented that he was present in March, 1863, when it was agreed between William Shields and the plaintiff that the plaintiff should have the place from the 1st of April, 1863. Plaintiff was to put on two thousand rails for the first year's rent: after the first year plaintiff was to pay \$100 a year for the improved land within the fences: the plaintiff might split rails on any part of the lot, and be allowed 7s. 6d. per 100 for them instead of the 2,000 rails. After three years plaintiff was to pay rent for any additional land he might himself clear. That at the time this agreement was made another tenant was on the place, whose term expired on the 1st of April. Plaintiff entered before the other tenant left, but he left soon after the plaintiff entered. That it was contemplated the agreement should be in writing, but William Shields died the same spring.

Henry Loucks was also called to prove the agreement. He understood plaintiff was to have the place for any term under eight years. He was to have it the first year for putting on 2,000 rails: he was not bound to put them on the first winter, but to get what he could the first winter. After this he was to pay \$100 a year for the cleared land. He was to clear more land and have it free for three years for clearing it: then he was to pay 12s. 6d. an acre for it, the rate at which the rest was calculated. He was to get possession on the 1st of April when the other tenant left. There was a clearing of forty acres, and it was talked of at 12s. 6d. per acre, which would make the \$100 rent. He understood the money rent was not to begin till the 1st of April, 1864. It appeared that after the sale it was found there was a balance

of \$10 22 two much made ; this was paid to the plaintiff and received by him without remark. The sale was shown to have taken place on the 31st October, 1864.

At the close of the plaintiff's case, *M. C. Cameron*, Q. C., objected that there was no proof of the agreement as set out in the first count ; that all must be proved.

The learned judge directed the jury, that the question was whether there was any ascertained sum due for rent at the time of the distress. He charged the jury that both witnesses said there was to be no money rent for the first year ; that they varied a little in other details ; but were both clear in this, that the defendant professed to claim \$100 for a year's rent. If no rent was due when the distress was made, the jury were to assess the damages for plaintiff for the defendant's illegal act, and that double damages were recoverable.

To this charge *Cameron* objected, contending that as plaintiff took back the \$10 22 from the bailiff he ratified the sale, and could not sue for double value ; that the learned judge should have told the jury, that if rails were due, although no money was due, the distress would be lawful. This being assented to by the counsel for the plaintiff, the judge so directed the jury. The jury found verdict for plaintiff, \$180 94, which being doubled made \$391 88, for which the verdict was endorsed on the record.

In Hilary Term *McMichael* obtained a rule calling upon the plaintiff to shew cause, why the verdict should not be set aside and a new trial had, on the ground that there was a failure of proof as to the first count, there being a variance between the contract set out in the first count and the contract proved ; and that plaintiff by receiving back a portion of the proceeds of the sale condoned the wrong, and could not sue for double damages, and for misdirection on these points.

During the present Term *Robert A. Harrison* shewed cause, citing *Gwinnet v. Phillipps* 3. T. R. 643 ; *Sells v. Hoare*, 1 Bing. 401 ; *Eardly v. Turnock*, Cro. Jac. 629 ; *Farewell v. Dickson*, 6 B. & C. 251 ; *Hoare v. Lee*, 5 D. & L. 765, S. C. 5, C. B. 754 ; Arch. L. & T. 2 ed. 133, 134 ; Woodfall's L. & T. 7 ed. 392.

M. C. Cameron, contra, cited *Williams v. Jones*, 11 A. & E. 643.

J. WILSON, J., delivered the judgment of the court.

The real question in this action was, whether the distress and sale were made for rent pretended to be in arrear and due, when in truth no rent was in arrear or due to the defendant. It is an action on the case on the 5th section of the 2 Wm. & M. sess. 1. The relation of landlord and tenant must necessarily arise out of contract; but this action is not brought upon the contract, but on a wrong which the landlord committed against his tenant, by pretending that there was rent due, when there was none due.

The contention of the defendant is, that the contract as laid must be proved with the same strictness as if the action were upon the contract. The plaintiff contends that it is enough for him to show the relation of landlord and tenant, and that no rent in fact was due when the distress was made.

The case of *Gwinnet v. Phillips et al.* (3 T. R. 643), was an action on the 11 Geo. II. ch. 19, s. 3, to recover double the value of goods removed to prevent a distress. The declaration stated that £57 were in arrear for rent. At the trial the notice of distress was produced which alledged that £55 were due. It was objected by the defendants that the plaintiff was bound by the notice of distress, and the plaintiff was nonsuited. This nonsuit was afterwards set aside.

Kenyon, C. J., said, "Here it was impertinent to state what the rent was: the defendants incurred a penalty under this act of Parliament in fraudulently removing the goods which were subject to the distress. Whether £5 or any other sum were in arrear was perfectly immaterial, the damage was not to be measured by the quantity of rent but by the value of the goods removed.

Ashhurst, J., said, "The gist of this action is the fraudulent removal of the goods from the premises in order to defeat the distress; it was therefore immaterial to the defendants whether one sum or another were due for rent, for in either case they are guilty of a tort."

In *Sells v. Hoare et al.* (1 Bing. 401), it was held that the plaintiff need not allege or prove the precise amount of rent

due in an action for an excessive distress for rent, and that it was no bar to such an action, that between distress and sale of the goods distrained the parties came to an arrangement respecting the sale.

In *Farewell (admin.) v. Dickenson* (6 B. & C. 251), debt for rent, the declaration stated a demise of a messuage, land and premises, with the appurtenances. The proof was of a messuage and land together with *the furniture, utensils and implements*. It was held that as the rent issued out of the real property it was sufficient to alledge and prove a demise of the real property, and therefore no variance.

The gist of the action before us is, the wrongful distress and sale when no rent was due. According to the evidence no money rent was due. But the defendant contended, that the evidence did not show that the rails, which were to be put on the farm as the first year's rent, had been put there. It was a question left by consent to the jury whether the plaintiff in this respect had made default, and they found he had not. The question is not clear as to when the rails were to be brought there, but we infer the plaintiff had the second year to complete the delivery of them, and we cannot say the jury were wrong in this respect. Whether the defendant would have had a right to distrain and sell for the nonfulfilment of the contract in regard to the rails, which were to be delivered as the rent of the first year, may be open to question; at all events, the defendant had the advantage of having this left in his favor by the learned judge.

The case of *Ireland v. Johnson et al.* (1 Bing. N. C. 162) is an authority for the necessity of stating correctly to whom the rent is due. Tindal, C. J., says, "The mode in which the rent becomes due, the party to whom it is due, and by whom the distress is made, are all material allegations."

In *Yates v. Searle et al.*, in which the holding *modo et forma* was traversed, the court upheld the case of *Ireland v. Johnson*, that it is necessary to shew on the face of the declaration to whom the rent was said to be due, and that a variance in this respect was fatal, and held the traverse good. There is no question that the plea of not guilty put in issue the tenancy and the ownership of the goods: *Williams v. Jones et al.*, (11 Ad. & E. 643); but here the tenancy, so

far as to entitle this plaintiff, was established, and the ownership of the goods was proved. The defendant has referred us to the case of *Hoare v. Lee* (5 C. B. 754). It is an authority to show that the second count in this declaration ought not to have been joined with the first, but this question does not arise here, for the damages were not assessed as applying to that count.

We think the evidence sustained the first count, and that there was no misdirection.

It has been urged upon us that the defendant, by receiving from the bailiff the surplus of the sale, condoned the wrong, and was precluded from the right to recover. In *Sells v. Hoare et al.* (1 Bing. 401), for an excessive distress for rent, it was contended the action would not lie unless there had been a sale of the goods; that the sale having been abandoned in consequence of an understanding between the parties, the plaintiff ought to have been nonsuited. By the court it was said, that the arrangement between the parties respecting the sale of the goods distrained did not divest the plaintiff of his right of action.

The bailiff was bound to return to the owner of the goods distrained the amount which remained in his hands after satisfying the distress warrant and the costs of the sale. He could only say, if remonstrance had been made, "I know nothing of the dispute between you and your landlord, take this money; it is yours in any event." — We have been referred to no authority on this point. It was no part of the bailiff's duty to compromise the wrong, if any had been done. The payment of this money was not made, nor was it received, in satisfaction or compromise of the injury which the plaintiff had suffered.

In the amount of the verdict the defendant ought to have got credit for it in the proportion of the price received for the goods and their value. This was, as 127 is to 180, \$10 would be \$14 17 nearly, which, being doubled, would be \$28 34, for which the verdict ought to be reduced.

The rule will be discharged with costs, upon the plaintiffs agreeing to reduce the verdict by taking off \$28 34.

MOFFATT ET AL. V. GRAND TRUNK RAILWAY COMPANY.

Trover—Excessive damages.

Defendants undertook to carry for plaintiffs a quantity of oats to T., which they did, delivering them at an elevator there belonging to S., who received them to hold for plaintiffs. Of the quantity thus delivered plaintiffs received part before the elevator was destroyed by fire, as it subsequently was. There was a very large amount of grain besides the plaintiffs' in the elevator at the time of its destruction, most of which settled down in a conical mass on the wharf on which the building was stood, the remainder falling into the water. Plaintiffs desired to remove what remained of their grain, alleging that they could select it from the general mass, from their knowledge of the portion of the building in which it had been stored; but the defendants, who were the bailees of the greater part, assumed charge of the whole for the benefit of all, and refused to allow plaintiffs to do so, stating that it would be sold for the general benefit, which it accordingly was, when the plaintiffs' share of the proceeds of the sale was found to amount to only about \$28.

Held, that plaintiffs could maintain trover against defendants in respect of their grain so disposed of by defendants, inasmuch as the latter had no control over it, and ought not to have prevented plaintiffs from removing it if they could find it. *Held*, also, that this was a case in which no greater than the actual damages sustained should have been assessed; and, the jury having awarded excessive damages, the court made such an order as would secure as far as possible the necessary relief in that respect.

This was an action tried before J. Wilson, J., at the last winter assizes in and for the county of the city of Toronto.

The declaration contained four counts. The first charged the defendants, as common carriers, for not delivering safely at Toronto 9,568 bushels of oats, received by them at Chicago, to be carried to Toronto. Second count, for mixing the oats with corn, whereby they were lessened in value. Third count, special contract for carrying the oats from Chicago to Toronto, and there delivering them at the elevator in bags, to be delivered for that purpose: breach, non-delivery. Fourth count, trover for oats partially destroyed by fire.

Pleas, not guilty, non-assumpsit, and loss of oats by fire.

The delivery of the oats was not in fact disputed. The defendants received from plaintiffs 9,568³¹ bushels, which came to Toronto less 73³¹ bushels. Of this quantity 45¹⁸ bushels were lost during the carriage from Chicago to Sarnia, and were paid for; the other 45¹³ were lost between Sarnia and Toronto, and admitted to be worth \$11 68. Of the quantity thus sent, 3,538 bushels became mixed with Indian corn. The whole was delivered at the elevator in Toronto, and there held in store by Shedden & Co. for the plaintiff. This elevator was used for two purposes; first, for

storing grain by the defendants, which they were carrying to eastern customers; secondly, for storing grain by Shedden for delivery in Toronto; the defendants' undertaking, in regard to grain for Toronto, being to deliver it in store in the elevator.

On the arrival of the plaintiffs' oats, they were stored in the elevator for the plaintiffs, and at their risk. Before the destruction of the elevator, the plaintiffs had received 2,578²⁷ bushels, and had then there 6,921 bushels, the remaining 73 bushels having been lost in the transit. The elevator was destroyed by accidental fire. At the time, it contained wheat, corn, oats and other grain, to the extent of 66,687 bushels. The building stood upon a wharf. The floor was about sixteen feet above the wharf: cars could be run under. The bins were about forty feet deep, and ten feet square. When the building was burnt, the whole mass settled on the wharf, in the shape of a flat cone: the rest fell into the lake. It was in a smouldering condition for many days; but when the fire had subsided, the plaintiffs went with a number of men and a barge, to take away what remained of their grain, alleging that they could take their grain, from knowing where the bins were in which it was stored. In the meantime the defendants, being the bailees of the greater part of it, had taken charge of the whole for the benefit of all concerned. They refused to allow the plaintiffs to take any of it, alleging that it would be sold for the general benefit. Soon afterwards the defendants directed Mr. Shedden to remove the most damaged part of the mass, and have it sold to the best advantage, they furnishing cars and engine free for the purpose. The more damaged part was put in heaps on the shore, and sold in twenty-three lots, at from \$1 to \$29 a lot. There yet remained on the wharf 13,711 bushels of wheat, oats and corn, damaged. 1,000 bushels were sold at 10c. a bushel, 200 bushels at 10c., 100 at 7c., and 12,411 at 5c. This last lot was sold to a Mr. James, who said he took it away and sold it at from 9c. to 20c. a bushel. The whole brought \$820, but the expenses were \$600. It was shown that the plaintiffs' oats were in bins, near the sides; and the probabilities were, that the greater proportion of his was more injured by fire and fell more into the water than

the general mass ; but assuming all shared in proportion, he would have owned about one-ninth of what remained.

There remained to divide only \$250, of which the plaintiffs' share would be \$27 77.

There were sold by the bushel, of this damage mass, 13,711 bushels, at from 5c. to 10c. per bushel. A ninth of this would be 1,524 bushels, say, at 10c., \$152 40.

The defendants admitted their liability for the mixing the corn with the wheat, and the proof was 5c. a bushel would separate them. But 3,538 bushels were mixed, which at 5c. would be \$177 90. They admitted their liability for the 28¹³ bushels lost, \$11 68. The damages of the plaintiffs would thus be = $\$11\ 68 \times \$117\ 90 \times \$152\ 40 = 341\ 98$; but they paid into court \$250, making the damages ultra \$91 98.

The learned judge charged the jury, that on the matter of contract the defendants were liable for the quantity lost on the way, and for the damages arising from mixing the corn with the oats ; that on the count in trover, they were liable for the value of the damaged oats taken in charge by them and sold under their direction ; that although it seemed the fairest way, and perhaps the best, to keep all and sell it for the general benefit, still the defendants had no right against the plaintiffs' will to take his property and sell it.

M. C. Cameron, Q. C., objected, that there was no conversion in doing what the plaintiffs did, when the whole mass was mixed.

R. A. Harrison objected, that the judge should have told the jury to assess damages on the whole oats that were mixed with the corn.

In Hilary Term last, *McMichael*, for defendants, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the verdict was contrary to law and evidence ; and for misdirection, in charging that the defendants were guilty of trover with respect to the grain held by them ; and for excessive damages.

R. A. Harrison now showed cause. He cited *Burroughs v. Bayne*, 5 H. & N. 295 ; *Weeks v. Goode*, 6 C. B. N. S. 367 ; *Tear v. Freebody*, 4 C. B. N. S. 228 ; *Atkinson v. Marshall*, 12 L. J. Ex. 117 ; *Johnson v. Stear*, 15 C. B. N.

S. 330, S. C. 9 L. T. N. S. 538; *Tredwen v. Holman*, 1 H. & C. 72, S. C. 10 Jur. N. S. 991; *Great Western Railway Co. v. Gurton*, 1 F. & F. 359; *Morton v. McDowell*, 7 U. C. R. 338; *Thomas v. Harris*, 1 F. & F. 67; S. C. 27 L. J. Ex. 353; *Flint v. Bird*, 11 U. C. R. 444; *McDonald v. Cameron*, 4 U. C. R. 1; *Comer v. McKinnon*, ib. 350; *Barclay v. Adair*, 7 C. P. 157; *Mayne on Damages*, 347.

M. C. Cameron, contra.

J. WILSON, J., delivered the judgment of the court.

It has been argued that trover does not lie against these defendants for anything they did with the damaged grain. When the defendants had delivered the plaintiffs' grain in the elevator, and they had received it there, and stored it with Shedden, they had no pretence for taking charge of it. They were bailees, it is true, of the other grain there, but were in no way liable for its loss or destruction by fire; and they had no right to prevent the plaintiffs from taking their grain if they could find it, or causing it to be sold, because they could not separate it from the grain which they held as bailees. In *Burroughes v. Bayne* (5 H. & N. 296), what trover is has been well defined. There it is said: "In ordinary cases the plaintiff's proof is much the same as would be required in an action of detinue; but the word 'conversion,' by a long course of practice has acquired a technical meaning,—it means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Holt, C. J., in *Wilbraham v. Snow* (Wms. Sand. 47 g.), says, "that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one-self the property in, and right of disposing of, another's goods." Here the defendants did assume the property in the defendant's goods, and the right of disposing of them, and the actual disposal of them. There can be no clearer case of trover than the defendants were guilty of, in respect to the damaged grain of the plaintiffs.

The defendants say the damages are excessive. We think they are. This was a case in which, we think, a jury should

not have assessed damages beyond the actual loss, and the plaintiff ought not to seek or gain advantage by an unintentional wrong. It is quite clear, that if all the owners of that heap had gone there, as the plaintiffs seemingly did, and claimed the right to take from the damaged mass a quantity equal to the grain each had there, they could not have succeeded; for there were only about 14,000 to meet 66,000; and it was so mixed, that no one could with any certainty have said what was really his from what was his neighbour's. The fairest way was, either to divide in proportion, or sell for the general benefit, as the defendants proposed to do.

A division was not practical, for the owners were not there. A sale was the other alternative, for a scramble was inexpedient, and could only have resulted in a series of wrongs. This the defendants took upon themselves to carry out; and if they had acted wisely, and advised with the plaintiff as to the best and fairest mode of doing it, perhaps no cause of complaint would have arisen. As it was, they chose to assume the whole responsibility, and we are not surprised that the plaintiffs did not acquiesce in what the defendants did; for that which sold for anything had not been moved at all; while that which absorbed nearly all in its removal was of no value. The plaintiffs, from the result, had good reason to suspect either that those employed did not act in the interests of the owners, or that the defendants, while seeming to give assistance as far as motive power was concerned, were using what was available for the purpose of clearing away rubbish, which otherwise they would have been obliged to remove at their own expense.

Deducing from the evidence what we think the plaintiffs were fairly entitled to, we think their damages ought not to have exceeded \$100 beyond the amount paid into court.

The only relief we can give, is to direct a new trial to be had, upon payment of costs by the defendants, unless the plaintiffs shall agree to reduce their verdict to \$100, in which case the rule will be discharged with costs; but if the defendants decline to take a new trial on payment of costs, and the plaintiffs decline to reduce their verdict, then this rule will be discharged without costs.

KING V. MACDONALD.

Seizure by division court bailiff—Trespass against sheriff for subsequent seizure—Pleading—Practice.

A seizure of goods under a division court execution being entitled under sec. 266, Con. Stats. U. C., ch. 22 to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter for the seizure made by him, the goods being under the division court writ already in the custody of the law.

Held, also, that in the absence of a count in the declaration for money had and received, plaintiff could not recover for the surplus money which under sec. 251 the sheriff could have seized in the hands of the division court bailiff after satisfaction of the prior execution.

Semble, that in accordance with *White v. Morris*, 11 C. B. 1015, the mere production of the *fi. fa.* will not enable the sheriff to shew that a deed which is good against all creditors is void against the latter, but that he must also prove the *judgment* on which the writ issued.

This was an action of trespass for taking a carding machine, picker, &c., and trover for the same goods. 1st plea, not guilty. 2nd. Not possessed.

The case was tried before the Chief Justice for Upper Canada at the last spring assizes in and for the county of Grey, and a verdict rendered for plaintiff for \$375.

Edward Bowles, who was the son-in-law of plaintiff, in February, 1864, had leased a shop and water-power sufficient to propel a carding machine, fulling mill, shearer, &c., from one Hannah, of which he was to be put in possession on the 20th of May, 1864, at the rent of \$100 a year. He had borrowed from one Brighty \$206, on whose execution the defendant had seized the goods in question. Partly with this money and partly on credit he had purchased this carding machine and picker from one Eggleston, who for the balance of the price of the carding machine and packer (\$375) required security. Bowles applied to the plaintiff to become his surety, and he joined in the notes to Eggleston. Bowles, on the 14th of April, 1864, gave plaintiff a chattel mortgage on these machines which was void by defect in the affidavit of the mortgagee; but he afterwards and on the 9th of September, 1864, by an agreement in writing professed to sell to plaintiff the machines and all the machinery in the shop in consideration of his liability for the notes to Eggleston, and his agreeing to pay \$40 down and give his notes for \$220; namely, three notes for \$73 33, the first to fall due on the 1st of January, 1876, and the other two in each of the succeeding years. Bowles, at the opening of this business on

the first of June, seemed unwilling to use his own name in consequence of his fearing an action might be brought against him; for he issued an advertisement on the 16th of May, setting forth that the new woolen works would be opened by Samuel King, plaintiff's son, on the 1st of June, 1864. Bowles did, however, begin and carry on the business in his own name without question till the 9th of September. Just before this time Brighty had told Bowles of his determination to sue him, the debt being then \$252. On the 10th of September Bowles said he delivered over all the property to plaintiff and took down the sign. Plaintiff took possession of all; but it was agreed that Bowles should go on and conduct the business at \$1 a day as wages. He continued to work the machines till the 12th of November, when Smith, the division court bailiff, seized the machines, and the work was stopped. On the 24th of November, 1864, the defendant issued his warrant to Thornhill, his bailiff, to seize at the suit of Brighty, who is the Brighty spoken of. Bowles admitted that if Brighty had not threatened there would have been no need of the bill of sale, and that his threats created the necessity. He admitted there was no writing as to how he was to be employed, and that he gave the plaintiff \$15 or \$16 out of the business.

On the day Thornhill received his warrant he went to seize the property, but found it in the possession of Smith, the division court bailiff. He seized it however, and advertised and sold it, but Smith in fact made the sale on his own execution, and on behalf of Thornhill on the execution of Brighty. He received of the proceeds of the sale \$231.

At the close of the plaintiff's case *Robert A. Harrison* moved for a nonsuit on the following grounds: 1st. That the plaintiff had failed on the issue of not guilty, there being no proof of trespass by sheriff and no conversion. 2nd. No continuous change of possession. 3rd. The bill of sale was made to prefer King.

The case proceeded and the jury found a verdict for plaintiff with \$375 damages.

The learned judge reported, that he told the jury the defendant was by his warrant sufficiently connected with the acts done by Thornhill in execution of the writ set out in the

warrant, put in by the plaintiff, to charge the defendant, being sheriff; but that the warrant afforded evidence for the defendant that he was acting in execution of the writ stated in the warrant. The learned judge, reserving leave for the defendants to move for a nonsuit, asked the jury to say whether as a matter of fact, Thornhill adopted as his own act the seizure; previously made by Smith, the division court bailiff, and directed or took part in the steps taken in pursuance of that seizure: and if so, that the plaintiff was entitled to a verdict on not guilty on the count in trespass.

In a similar manner, *mutatis mutandis*, he directed as to the count in trover.

As to *not possessed*, he directed that as the goods had been the property of Bowles at first, and plaintiff's title to them derived from him, and as they were apparently in the possession of Bowles, it was not necessary for the plaintiff to plead Brighty's judgment and execution; and the more so, if the plaintiff had a paper title to the goods; that as to the chattel mortgage, the plaintiff's claim was good for nothing, but rested on the bill of sale of 10th of September, 1864; that as to possession, there was no evidence of a formal delivery, and the jury were to say whether the change of possession was actual or pretended; and if actual, whether continuous; and they should decide this on the evidence of how the business was conducted and the property dealt with that they were to say although the possession was changed and the change continuous, whether the bill of sale was made to delay or defeat creditors, and if so, that it was void; that they ought to consider the value to be given to the testimony of Bowles, on which, to a considerable extent, the plaintiff's case rested; if his testimony were rejected, they could not well find for plaintiff; that there was the general question of fraud, the transaction of sale as being merely colourable and not intended to pass the property, and made by a man who thought himself, or was really insolvent, when he made it; that the long postponement of the consideration and interest not reserved was a feature not to be overlooked.

The attention of the learned Chief Justice, when he had nearly concluded, was called to the 8th section of the Insol-

vent Act, when, at the moment, he thought and said that the words "afterwards become an insolvent" meant an insolvent *under the Act*, to which *Mr. Harrison*, for defendants, objected; and he objected to the court's saying that the count in trover was sustained. He also contended that the Sheriff was not responsible for the full value of the goods.

In Easter Term, *Harrison* obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the grounds that the plaintiff failed to prove, as against defendant, either the trespass alleged in the first count or the conversion alleged in the second count of the declaration; and that the plaintiff's remedy, if any upon the evidence, was money had and received, for which no count was contained in said declaration.

Or why the said verdict should not be set aside and a new trial ordered between the parties, upon the ground of misdirection, in this that the learned Judge who tried the said cause ruled their was evidence of an adoption by the bailiff of defendant of the seizure previously made by the bailiff of the Division Court: that if defendant's bailiff adopted the seizure, defendant became and was a trespasser by relation; that if defendant's bailiff took the proceeds of sale, or any part thereof, defendant was proved to have converted plaintiff's property, or some part thereof, in the second count of the declaration mentioned, to the extent of the proceeds so taken; that defendant was liable to the full value of the property sold by the Division Court bailiff, and that sec. of the Insolvency Act, 27 and 28 Vic. cap. 17, had no application whatever to the case.

Or why the said verdict should not be set aside and a new trial had between the parties upon the ground of improper rejection of evidence, in this, that the learned Judge rejected evidence of facts and circumstances which afforded a fair presumption or inference on the question of the *bona fides* of the transfer from Edward Bowles to the plaintiff, which was one of the questions in dispute, and which facts and circumstances would, if admitted in evidence, have fairly and reasonably aided the jury in arriving at a just and true conclusion on the question of *bona fides*; and in this that the learned Judge rejected evidence of statements

made by and acts done by Edward Bowles, in regard to his fraudulent dealings with the property in dispute, both before and after the time of the alleged sale, showing a want of *bona fides* in the sale.

Or why the said verdict should not be set aside and a new trial had between the parties upon the ground that the said verdict was contrary to law, evidence, the weight of evidence, and the judge's charge, in this, that the bill of sale under which plaintiff claimed to own the property in dispute, was not proved to have been filed in the office of the clerk of the county court; that no immediate delivery and actual and continued change of possession was shown; that Edward Bowles, the alleged vendor, was insolvent at the time of the alleged sale; that the alleged sale was made with intent to defeat or delay the creditors of the said Edward Bowles, or with intent of preferring plaintiff, his father-in-law, one of said creditors; and that considering the time when the alleged sale was made, the price agreed to be paid, the times and terms of payment, the value of the property sold, compared with the price to be paid for the same, the continuance of Bowles in possession, notwithstanding the sale and other circumstances both before, at the time of, and subsequent to the sale, the sale was proved to have been colourable, and not *bona fide*.

McKenzie showed cause, and cited *Gray v. Fortune*, 18 U. C. R. 253; *Darlington v. Pritchard*, 4 M. & G. 783; *Rundle v. Little*, 6 Q. B. 174; *Peddell v. Rutter*, 8 C. & P. 337; *Powell v. Hoyland*, 6 Ex. 67; *Neilan v. Hanny*, 2 C. & R. 710; Roscoe Ev. ed. 1862, 782; *Phillips v. Eamer*, 1 Es. 355; *Penr v. Scholey*, 5 Es. 243; *Lewis v. Rogers*, 1 C. M. & R. 48; *Foster v. Smith*, 13 U. C. R. 243; *Walker v. Grange*, 8 C. P. 431; *Barton v. Bellhouse*, 20 U. C. R. 60; *Taylor v. Commercial Bank*, 4 C. P. 447; 27 & 28 Vic. cap. 17.

Harrison, contra, cited *Wilson v. Tummer*, 6 Sc. N. C. 894; *Wilson v. Baker*, 4 B. & Ad. 614; *Woollen v. Wright*, 31 L. J. Ex. 573; S. C. 7 W. R. 715, 7 L. T. N. S. 73; *Kennedy v. Patterson*, 22 U. C. R. 556; *Walker v. Olding*, 1 H. & C. 621; *Cronshaw v. Chapman*, 7 H. & N. 511; *Clarke v. Stevenson*, 24 U. C. R. 200; *Rex v. Egerton*,

R. & R. C. C. 375; *Llewellyn v. Winckworth*, 13 M. & W. 599; Tay Ev. 2 ed. 301; Con. Stats. U. C. c. 22.

J. WILSON, J., delivered the judgment of the court.

The 226 sec. of the C. L. P. A. settles the priorities of executions in the hands of sheriffs and Division Court bailiffs, and leaves him to seize and hold the goods whose execution has been first received.

Smith, the Division Court bailiff, had his execution, and actually made a seizure of the machines in question upon it on the 12th November, 1864. The sheriff got his writ of *fi. fa.*, and issued his warrant to Thornhill upon it on the 24th November. He says he found the machines in the possession of Smith, who had before then seized them. They were then in the possession of Smith, or rather in the custody of the law, and could not be seized by the sheriff's bailiff so as to make the sheriff a trespasser. The sheriff could, by the 251st section, seize the money in Smith's hands as the surplus of the former execution. This, we think, was all the sheriff's bailiff did, or was authorized to do, under the circumstances.

There is no count for money had and received to enable the plaintiff to recover the money, which in this view of the case would belong to him, and, therefore, there ought to be a nonsuit entered on the first ground.

It will not be necessary to adjudicate upon the other matters mentioned in the rule; otherwise, this case would have raised an important question; for there was much force in the contention of the plaintiff, that the sheriff here did not show that he represented a creditor.

This transfer of these chattels may have been good as between King and Bowles, although bad as against a creditor; for if we assume that the deed of the 9th September, 1864, was intended by the parties to operate as a deed, though fraudulent and void as against creditors, it was good as against all persons except creditors. Now it was an established rule of law, not doubted until the case of *Bessey v. Windham* (6 Q. B. 166), that the mere production of the writ of *fi. fa.* and nothing more, would not enable the sheriff to show that a deed was void which was good as against all

except a creditor. He was obliged to show that he represented a creditor, and this was done by proving the judgment as well as the writ.

The case of *White v. Morris* (11 C. B. 1015) resembled this in regard to the point of which we are now speaking and there it was held that the bailiff as well as the execution creditor, was bound to prove the judgment, and that the warrant reciting it, though put in by the plaintiff, was no evidence of such judgment. There, as here, the woods were found in the actual possession of him who had owned them.

Our practice has been to hold it enough for a sheriff to show the execution, if the goods were taken from the actual possession of the execution debtor, adopting the rule laid down in *Bessey v. Windham* rather than the ancient rule, and the one upheld in *White v. Morris*. We doubt, as the learned judge doubted, the *bona fides* of this case. If the plaintiff is so advised, he may bring another action, in any form he pleases, and the opinion of another jury may thus be taken on the facts about which both the learned Chief Justice and we have doubts.

FOURDRINIER V. HARTFORD FIRE INSURANCE COMPANY.

Policy of insurance—Date and issue of—When insurance effected—Statement of insurable interest.

Plaintiff, in March, 1861, made a written application to defendants for insurance on certain premises. The risk was accepted conditionally, on certain alterations being made, until the making of which it was not to be considered as taken. After these alterations were made, no steps were taken towards completing the contract of insurance until January, 1862 when a policy, dated in May, 1861, was issued and delivered to plaintiff. Among other conditions of the policy were these three: 1st, that the policy should not be binding on the company until *actual* payment of the premium 2nd, that applications for insurance should specify the construction of the building to be insured, and that *after* the effecting of the insurance any increase to the risk by any means whatever within the control of the insured should avoid the policy; that if the property to be insured were leasehold, or other interest not absolute, it should be represented to the company, and expressed *in the policy in writing*.

The premium was not paid in full till January, 1862, on the day of the issue and delivery of the policy to plaintiff.

Between March, 1861, and January, 1862, a funnel for conducting shavings from an upper to a lower story, in front of a furnace, was placed in the insured building; this addition or alteration, it was proved, increased the risk.

There was also a mortgage on the premises, which was mentioned in the *application* of insurance.

Held, 1st, That the insurance was not effected until January, 1862, and that the policy not having then a retroactive relation to its date for any other purpose than for the computation of the period at which it should expire, the risk by the erection of the funnel was not increased *after* but *before* the making of the policy; 2nd, that the third condition had been sufficiently complied with, inasmuch as the property was specified in the *application* as mortgaged property, and the application was by the term of the policy a part of the latter, and therefore the mortgage interest was represented to the company, and expressed *in the policy in writing*.

The plaintiff sued for the recovery of the amount for which they had insured their building against fire with the defendants.

The declaration stated that the defendants, by a policy of insurance, dated the 13th May, 1861, made by the defendants in consideration of \$112 to them paid by the plaintiffs, did insure the plaintiffs against loss or damage by fire to the amount of \$2,800, as follows: \$400 on the building in the policy described, and \$2,400 on machinery, stock and tools contained in the said building, from noon on the 13th May, 1861 until noon on the 13th May, 1862. The policy contained a great number of special provisions having no application to the present suit; and it contained among them a provision that the conditions which were annexed were to be used to explain the rights and obligations of the parties in all cases not in the policy specially provided for. The conditions necessary to be referred to were the following:

1. "Applications for insurance must specify the construction and materials of the buildings to be insured, or containing the property insured, &c. If, after insurance is effected either by the original policy or by the renewal thereof, the risk shall be increased by any means whatever within the control of the assured, * * * * such insurance shall be void and of no effect, &c.

2. "No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium by the assured to the company or their agent.

3 "Property held in trust or on commission must be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proof of such loss, together with their respective interests therein certified by them. By "property held in trust" is intended property

held under a deed of trust or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be liable only to the extent of the interest of the assured in such property. Goods on storeage must be separately and specifically insured. If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be represented to the company and expressed in the policy in writing, otherwise the insurance shall be void."

The declaration then, averring general performance, alleged the loss of the premises by fire while the policy was in full force, by which the plaintiff sustained loss to the amount for which he had been insured.

The defendants pleaded the following pleas :

1st. They did not make the policy.

2nd. They were induced to make it by the plaintiff and one Frank M. Holmes, acting in concert with the plaintiffs by means of the fraud, covin, and misrepresentation of the plaintiffs and Frank M. Holmes.

3rd. The application for insurance did not truly specify the construction and materials of the building, but contained a false description of the building and of its contents, contrary to the first condition.

4th. The risk was increased by the plaintiffs without the knowledge or consent of the defendants, by the erection in the building insured of a spout in front of the fire arch, and for the purpose of passing shavings and refuse from the stave machine on the second floor of the building to the furnace, and by other alterations made in the building, contrary to the first condition by reason whereof the insurance became void and of no effect.

5th. The interest of the plaintiffs in the property insured was not only represented by the plaintiffs to the defendants, nor expressed in the policy in writing according to the third condition, by means whereof the insurance became void.

Issue was joined on these pleas.

The cause was tried at the last Brockville assizes, held before the Chief Justice of this court, when a verdict was rendered for the plaintiffs for \$3,200 damages, being the full amount of the policy, and a sum of \$400 for interest for its

detenion. The following facts appeared from the evidence for the plaintiff :

Francis M. Holmes, who had been the agent of the Bank of Montreal at Brockvill for twelve years, said that an application was made to John Taylor, the agent for the defendants in March, 1861, to insure the plaintiffs' premises. The bank were mortgagees in fee of the building insured by a mortgage, dated the 20th of February, 1861. Taylor knew of this and it was mentioned in the application for insurance. Holmes further said: "I went with Taylor (the agent) to see the premises. I gave him the check for the premium amounting to \$70: it is dated the 27th of March, 1861, and he gave me a conditional receipt on the same day. Taylor afterwards said the company would not accept the risk at the rates charged. I told him I would for the bank guaranteed the amount of the difference. After that Taylor went out again: he went out to see that the alterations suggested in the letter from the head office were carried out. I think I went with him. The alterations were made according to the suggestions, and Taylor expressed himself perfectly satisfied. On the 17th of January, 1862, learning that Fourdrinier had not paid the balance of the premium, I gave Taylor a check for \$38. On the 23rd of January I went for the policy and was told there was still a balance of \$4, for which I gave a check. I gave the money to Fourdrinier and he brought me the policy. The first check was not paid till the 18th of January, 1862: it had been marked good, and I was under the impression it had been paid. It was accepted by Taylor as cash. Taylor knew the bank was to have had an assignment of the policy, and it was assigned. The fire happened early in May, 1862. When the application was made there was not a spout for conducting the shavings from the upper story to the lower in front of the furnace. I think Taylor saw that alteration, although the policy is dated in May, 1861. The policy, endorsements, and approval are all made long after that date. The plaintiffs told me the fire happened from the shavings below, and when they were on fire the flame ascended through the spout to the upper part of the building. The funnel was made I think after the

policy issued. I did not at the time think the alteration increased the danger; but I think now it did."

Archibald H. Franklin said: I was engineer on these premises from May, 1861, until March, 1862. I think the funnel was put up in June or July, 1861. Taylor was out when I was there: can't say of this spout was up when Taylor was there. The spout was about six feet from the furnace. I had fears the spout would catch fire and burn the place up. I never left it at dinner time or at night without sweeping away the shavings from the front of the furnace. I think old Mr. Fourdrinier was there when Mr. Wilson said he thought it would burn the building up yet. The foreman in the shop had a discussion with the plaintiffs about the danger from putting in this funnel. When the shavings came down they would sometimes roll towards the furnace."

The evidence for the defendant was to the following effect:

John Taylor said: "I was the agent of the defendant in Brockville, I did not suppose there would be any insurance, and paid no attention to the proposal or letter, and they are lost: I have searched for both frequently and can't find them. I supposed I had given Mr. Holmes an interim receipt: I heard afterwards it was an annual receipt for premium: I wanted him to take the check back: I did not want to issue the policy: I never went out to examine the property, not specially for that purpose: I went out there once on other business: I went to the buildings from curiosity: this was late in the fall, in the latter part of October. The policy is dated from the day that Mr. Holmes undertook to pay the additional premium. Nothing was said to me about the spout, I was not aware of it until after the fire: I can't say if it was there when I was there or not, or that I would have known what it was for or not. The policy was issued under the proposal of March. The company did not know till after the fire that I had got the money from the bank: I gave Mr. Chaffey the money. I went out twice to look at the premises, but not officially; not to inspect them. The first time I went out was in June or July. I asked a man there if any alterations were made

in the premises ; he said none that he knew of : this was in the fall. I always, as to the other policies, sent the company within a week or ten days a copy of the policies and informed them I had issued them. I made this policy twenty *and a half* ($20\frac{1}{2}$), because Mr. Holmes was anxious to have it dated back to about the time the application was made ; and to make it that way I had to make it the *half*. I considered they forced the insurance on me. I considered, Mr. Holmes, by his solicitations, got that policy out of me. I can't say he exercised any influence over me in getting the policy. I don't think if he had not done as he did I would ever have issued the policy. The first the company knew of my having the money was after the loss. I did, after the matter was known, pay the money to Mr. Chaffey."

J. M. Allan said : " I was secretary of defendants in 1861. The copy of letter of 1st of April, 1861, is the only one sent by the company to Taylor on this subject : the risk was never returned to us, and by this letter we decline the risk ; we never heard anything further about it until after the fire occurred."

John B. Chaffey said : " I am defendants' general agent : I saw both plaintiffs after the fire : I asked them if Mr. Holmes had ever gone out and requested them to make alterations : they said he had not ; and if he had they would not have done it, for what did Mr. Holmes know about a stove factory. I told them it was important, and wanted to know if they had any objection to repeat that in the presence of a witness : they said not ; I brought a witness and they did repeat this in his presence."

Wm. Mowatt, who was called in as the witness on the occasion last referred to, said : " Mr. Fourdrinier said that neither Mr. Holmes nor Mr. Taylor had given him any instructions about alterations to be made about the boiler."

Charles R. Wilson said : " I think the spout materially increased the risk from fire from what it was before. I told old Mr. Fourdrinier I thought it dangerous. I did not think it safe so close to the mouth of the furnace."

Richard Coleman said : " I did not consider the spout a safe operation : it increased the risk, I have no doubt of it ; it increased the danger of burning the place very materially."

Thomas Watt said: "The fire caught facing the side door about five or six feet from the furnace: it was within a foot of the spout: it went up the spout as quick as gunpowder: this led it to the roof."

J. M. Allan, recalled, said: "If the alterations had been made that I had urged through Mr. Taylor, I would not have taken the risk in consequence of the spout: it increased the risk very much in my opinion: if it could have been taken at all it would have increased the rate."

The answers of Cyrus B. Fry, taken under a commission, were then read for the defendants. He said: "I worked as engineer for the plaintiffs at their stave factory from about the 1st of April, 1861, till about the first of June following. The beams (about the boiler) were in the same state previous to March, 1861, (as he had first stated them to have been), they were not removed, changed, cut, scooped out, altered or covered with any metal or composition, while I was in their employ till about the first of June. There was not, while I was in the plaintiffs' employ, any opening or spout in the floor above the boiler or furnace, through which shavings or chips were conveyed from the storey above to the furnace."

The learned Chief Justice charged the jury that the material points to be considered by them were:

1. Was the contract entered into by the fraud, covin, or misrepresentation of the plaintiffs and Holmes? The evidence to sustain it was that of Mr. Taylor. The difficulty was to say what the specific acts of fraud were which were said to have been perpetrated, unless it was the representation as to the alterations having been made with regard to the better protection of the building from the boiler and furnace, and the alleged concealment of the funnel; that if they found fraud, to find a verdict for the defendants on the second plea.

2. When did the policy take effect? If from the time of its delivery in January, 1862, which the jury must accept as the law, then the risk was not increased after that, for the spout was made many months before that time; and so the fourth issue should be found for the plaintiffs.

3. That as to the third issue, the jury must say whether the application did or did not truly specify the construction and materials of the building.

The policy described it as "a building of wood, two stories high, covered with wood and known as the Lyn Stave Factory," referring to the application which was made a part of the policy.

It was contended by the defendants' counsel that the jury should be told that the policy was to be considered as operating from the time of its date, the 13th of May, 1861, and not merely from the time of its actual issue in January afterwards; and so the risk by the erection of the spout had been increased by the plaintiffs after the making of the policy. And, also, that the jury should find the fifth issue for the defendants, because the mortgage to the bank operated as a holding in trust.

The jury found, as before stated, a general verdict for the plaintiffs.

In Michaelmas Term *S. Richards*, Q.C., obtained a rule *nisi* upon the plaintiffs to shew cause why the verdict should not be set aside and a new trial granted on the ground that the verdict was against law and evidence in this, that the risk had been increased after the insurance by means within the control of the plaintiffs, and that the defendants were therefore, entitled to a verdict upon the fourth issue; and also in this, that the evidence shewed the interest of the plaintiffs in the insured premises was an interest not absolute, and was not so expressed in the policy in writing; and that the defendants were, therefore, entitled to a verdict upon the fifth issue; and on the ground of misdirection in this, that the learned judge charged the jury that the insurance was not effected within the meaning of the condition as to change or increase of risk relied upon in the fourth plea until the policy was issued, completed, or delivered, or to that effect; whereas there was evidence to go to the jury that the insurance was effected before the time the policy was completed, or issued, or delivered, and before the change or increase of risk mentioned in the fourth plea. And also in this, that the learned judge in effect ruled on the evidence that the change or increase of the risk took place before the insurance was effected; whereas on the evidence the insurance was made before the change or increase of risk; or there was evidence to go to the jury to that effect, for that

the policy bore date and was made and intended by the parties to be in force and have effect from a period anterior to the time of the change or increase of risk, and that the condition should have been construed in relation to that time.

In Hilary Term last, *A. N. Richards*, Q. C., shewed cause.—The third condition refers to property held on trust or on commission. This property was not held either on trust or on commission, but subject to a mortgage; and mortgages are not mentioned in this condition at all, but they are, although with a different intent, in the fourth condition; they must, therefore, have been purposely omitted from the third condition: *Ogden v. The Montreal Insurance Company*, 3 U. C. C. P. 512; *Hutchinson v. Wright*, 4 Jur. N. T. 749; Angell on Ins. 2 ed. sec. 59, and note (2) to same section, and secs. 182, 183; and Phillips on Ins. sec. 588.

A mortgagor has an *insurable interest* on the mortgaged goods to their full value; and it is this *insurable interest* which is referred to in the policy as an *interest* of this nature, or to the extent of a leasehold, or not an absolute interest. But as the plaintiffs, as mortgagors, had such an absolute interest so understood, it was not necessary they should have specially set forth what their interest was, because that was only required where the interest was of a special, limited, or qualified nature.

If it was necessary, however, that this mortgage interest should have specially appeared, it does so appear; for it was expressly stated in the application, and the application, by the terms of the policy, forms a part of the policy: *Sillem v. Thornton*, 3 E. & B. 868; *Routledge v. Burrell*, 1 H. Bl. 254; Phillips on Ins. 4 ed. secs. 70, 71.

As to the alleged increase of risk, the change was made which is said to have increased the risk, by the putting on of the spout leading from the upper to the lower floor, long before the issuing of the policy in January, 1862, although after the nominal date of it, on the 13th of May, 1861. But the policy was not a valid and perfect instrument until it was signed and issued; and when it did issue, it cannot have a retrospective operation for the mere purpose of defeating it; and, therefore, if there was any increase of risk, that increase was not within the terms of the condi-

tion, because it was not made *while the policy was in force*. The full premium was not paid until January, 1862, and according to the second condition, the policy was not binding until that payment was made.

Courts of Equity never compel a policy to be issued after the interim receipt has been given, excepting in cases where nothing remains to be done but to sign, seal, or deliver the formal instrument. All other terms must have been previously performed. Here, so long as the premium was unpaid, which it was until January, 1862, equity would not have directed any policy to be issued; during that time, therefore, the plaintiffs were not insured: Angell on Ins. secs. 33, 34. The statement in the policy, that the premium was paid on the 13th of May, 1861, is not conclusive: the true day of payment may be shown: *Dalzell v. Mair*, 1 Camp. 532, note (a); *Foy v. Bell*, 3 Taunt. 493; *Tarleton v. Staniforth*, 5 T. R. 695. And as also the real date or time of the delivery of the policy may be shown: Phill. on Insurance, secs. 25, 29, 127; *Stronghill v. Buck*, 14 Q. B. 784; *Meagher v. The Aetna Insurance Company*, 20 U. C. Q. B. 607; *Notman v. The Anchor Insurance Company*, 4 Jur. N. S. 712; *Platt v. The Gore District Mutual Insurance Company*, 9 U. C. C. P. 405.

S. Richards, Q. C. supported the rule.—The plaintiffs' interest, as mortgagors, was not an *absolute* interest. The condition provides for an absolute general *interest* in the property, and not merely for an *insurable* interest in it. It has been held that an engagement by an insured that he had a *perfect* title to property, was broken upon its being shown that he had only a title of a mortgagor: *Warner v. The Middlesex Insurance Company*, 21 Connecticut R. 444. So by alleging that the insured was the *owner*, when he held only a bond for a deed; *Smith v. Bowditch Insurance Company*, 6 Cush. 448.

The fact of a mortgage being stated in the application is not a statement of it in the policy, although the application is, by the policy, expressly made a part of it.

Then as to the risk, was it increased in fact? There can be no doubt it was: it is not disputed on the other side. The plaintiffs' case is, that it was not increased *while the*

policy was in force; and that raises the question, when did the policy come into force? The plaintiffs say now, although they did not so contend at the trial, for the chief justice first suggested the view which the plaintiffs now adopt, that it came into force only from the time of its issue in January, 1862, and that it can have no relation backward to the time of its date; while the defendants say, that whenever it was issued it referred forthwith backward to the day of its date, and was, therefore, a policy valid and operative as between these parties from the time to which it so related until the day fixed for its expiry.

If the defendants' view be correct, then this risk was increased during the continuance of the policy, and it should either have been left as a fact to the jury to say from what time the parties intended it should have operation; or the chief justice should have ruled, as a matter of law, that it had effect from the day of its date, and not only from the day of its delivery.

It cannot be said that Taylor, the defendants' agent, ever examined the premises, and accepted them as altered according to his wishes, because, although he saw the premises, he did not inspect them for the purpose of an insurance; and *knowledge* by an agent is very different from *notice* to an agent: the former will not bind his principal, the latter will: Phill. on Ins. sec. 922.

A. WILSON, J., delivered the judgment of the court.

The first question is, when did this policy, based upon an application in writing, made the 27th of March, 1861, first take effect? It is dated the 13th of May, 1861; the premium upon it was not all paid until the 23rd of January, 1862; and it was only issued and delivered upon this last-mentioned day. It provides for an insurantee for one year, from the 13th of May, 1861, to the 13th of May, 1862.

If it took effect after it was issued, by relation to the day of its date and of its computation, then, I presume, the defendants will be entitled to a new trial, and to succeed eventually; for there would appear to be very little doubt but that the risk was increased in fact. But if it did not take effect until its issue, then the plaintiffs should succeed,

unless their claim is forfeited for the misdescription of the premises ; for the risk was not increased after that time. The question then is, when was the insurance effected?

It is laid down in Phillips on Insurance (ed. 3, sec. 925) : "The risk may be assured by the underwriters for an anterior period, and cover losses prior to the date of the policy, provided there is no concealment or misrepresentation by either party. For this purpose, 'lost or not lost,' is introduced; but this clause is not necessary : it is sufficient if it appear by the description of the risk and the subject of the contract, that the policy is intended to cover previous losses."

On a policy "lost or not lost," it is no defence that the goods were damaged before the plaintiff acquired any interest in them. The court said : "Such a policy is clearly an indemnity against all past as well as all future losses. It operates in the same way as if the plaintiff, having purchased goods at sea, the defendant for a premium had agreed that if the goods had at the time of the purchase sustained any damage by perils of the sea he would make it good."

In *Mead v. Davison* (3 A. & E. 303), a policy of insurance on a ship lost or not lost is good, the ship having been accepted for insurance and the premium paid before loss; although the policy was not actually executed and stamped till the loss had happened, and both the insurer and the assured knew it.

The ship was accepted in July, 1829, when the premium was paid, and the insurance was to be for twelve months from that date. The policy was formally executed in October, 1829, when the ship was in fact lost, but known by all parties to be so. It is added : "Equity would have compelled him to execute the formal policy whenever tendered to him: in voluntarily executing, he has only performed a manifest duty, and cannot now retract his obligation."

It is quite clear, however, that until a policy has been delivered or accepted, at any rate by the assured, there is no binding contract between the insurer and the assured ; for so long as the assured has the power to reject the policy, there cannot be said to be a bargain, and one party cannot

be bound and the other not bound: (*Xenos v. Wickham*, 10 Jur. N. S. 339).

If the premium had been fully paid in this case on the 13th of May, 1861, and no question had arisen as to the increase of risk since that time, I see no reason why, if a fire had destroyed the property between May, 1861, and January, 1862, the plaintiff should not maintain an action on the policy against these defendants; for I think a policy may, by express stipulation, and where there is no fraud either practised or contemplated, have a retroactive operation. I see no reason why the parties may not expressly bargain for just such a contract as this.

The policy in this particular case must then either take effect from the 13th of May, 1861, the time of its date, or not until the 23rd of January, 1862, the time of its issue and acceptance. If it is to be governed by the date, the plaintiffs have forfeited the benefit of it by the increased risk which they have since then made upon the premises; and if, by the latter date, the difficulty in their way will be that the application of March, 1862, did not for January of 1862 specify correctly the construction of the building, because between these two dates this very dangerous spout or funnel had been added; and the policy is expressly based upon the application which is made a part of the policy.

I do not see how these plaintiffs could have considered themselves to be insured before the premium was actually paid, which was not done until the 23rd of January, 1862, for the policy expressly stipulates that it shall not be binding on the company until the *actual* payment of the premium; and any violation of this provision by the agent of the company, and participation in it by the plaintiffs, would have been a fraud upon the company, and would have invalidated the whole engagement: *Tarleton v. Staniforth* (5 T. R. 695).

But besides this, it appears the risk was not to have been taken until certain alterations had been made; so that there was no contract until they were completed; and there is no evidence that after they were done the defendants, by their

agent, did any act towards an insurance, or that the plaintiffs did any act on their part towards a payment of the premium until the ensuing January.

Upon the whole, then, on this case, I am of opinion the insurance was not effected until the 23rd of January, 1862, and that it had not then, for the reasons already stated, a retroactive relation to its date for any other purpose than for the computation of the period at which the policy would expire. If the policy could have taken effect from the 13th of May, 1861, I should be inclined to think there was a good deal of evidence to sustain the second plea of fraud—that is, fraud in law—to avoid the policy. But perhaps it should have been charged upon the agent of the defendants, as well as upon the other parties named in the plea.

No question was made on the third issue at the trial, nor on the rule which was moved, nor on the argument before us; and we are not disposed to examine it now; although if it had been open to us, I should have had great doubt whether it ought not to have been found against the plaintiffs.

It is not necessary to examine all the authorities referred to, for the purpose of saying whether they do or do not determine that the mortgagor's interest in property is within that provision of the policy, which declares that if the interest in the property be a leasehold *or other interest not absolute*, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void; because the property is mentioned in the *application* as mortgaged property, and the application is, by the terms of the policy, a part of the policy, and, therefore, the mortgaged interest was represented to the company and is expressed in the policy in writing, according to the general rules of construction governing contracts.

Rule discharged.

THE CHIEF SUPERINTENDENT OF EDUCATION IN RE HOGG
V. ROGERS.

School Trustees—Power to levy school rate at any time.

Under the acts relating to common schools, school trustees may *at any time* impose and levy a rate for school purposes; they are not bound to wait until a copy of the revised assessment roll for the particular year has been transmitted to the clerk of the municipality, but may and can only use the existing revised assessment roll.

This was an appeal from a judgment of the Judge of the Fourth Division Court of the county of Grey. The action was trespass against the defendant, a collector of school rates for Union school section number one, in the township of St. Vincent, for unlawfully seizing and detaining a horse, the property of the plaintiff. The warrant under which the seizure took place was under the seal of the corporation of the school trustees of Union school section number one, in the said township of St. Vincent. It was dated February 22, 1864. Annexed to the warrant was a rate bill or list taken from the assessment roll of St. Vincent for the year 1863, dated February 20, 1864, but endorsed rate bill 1863. Plaintiff refused to pay the rate, whereupon defendant seized the horse upon the premises assessed. About four or five days afterwards, plaintiff paid the amount for which he had been assessed, and the horse was restored to him. The learned judge held that the trustees ought to have waited for the making and completion of the assessment roll for 1864, before issuing their warrant to the collector to levy the rate, and that the collector receiving in February a warrant for the collection of such a rate based upon the assessment roll for 1863, the year preceding, was not legally authorized to execute such warrant; that the only roll which a township collector is authorized to receive and act upon is the roll made up, finally revised and certified, and delivered to him on or before the 1st October in the year in and for which the taxes mentioned in the roll are to be collected, and the collector's power under his roll ceases on the 14th December following, unless prolonged by express by-law or resolution of the county council: and that a school collector has no greater power than a township collector, and must proceed under the same restrictions as to

time and authority in the exercise of his duties. He therefore directed a verdict for plaintiff.

From this judgment the Chief Superintendent for Education in Upper Canada appealed. The case was first set down in the paper in Michaelmas Term last, when *T. Hodgins* appeared for the appellant, and cited *Con. Stats. U. C.*, ch. 64, sec. 27, sub-secs. 2, 11, 20; secs. 83, 109, 125; *Craig v. Rankin*, 10 C. P. 186; *Vance v. King*, 21 U. C. R. 187; *McMillan v. Rankin*, 19 U. C. R. 356; *Gillies v. Wood*, 13 U. C. R. 357; *Chief Superintendant of Schools re McLean v. Farrell*, 21 U. C. R. 441; *Doe v. McRae*, 12 U. C. R. 525; *Doe re McGill & Jackson*, 14 U. C. R. 113; *Spry v. Mumby*, 11 C. P. 285.

On a subsequent day, during the same term, *D. A. Sampson* appeared for the respondent, and the case was on his application allowed to stand over till the following (Hilary) term, when he again appeared, and cited *Timon v. Stubbs*, 1 U. C. R. 347; *Rob. & H's Dig. "Notice of Action;" Haight v. Ballard*, 2 U. C. R. 29; *Donaldson v. Haley*, 14 C. P. 81; *Bross v. Huber*, 18 U. C. R. 282; *Dunwich v. McBeth*, 4 C. P. 228; *Wilson v. Thompson*, 9 C. P. 364; *Con. Stats. U. C.* ch. 64, secs. 10, 16, sub-secs. 4, 34; ch. 49, sec. 13.

Hodgins, contra, cited *Newbury v. Stevens*, 16, U.C.R. 65.

J. WILSON. J., delivered the judgment of the court.

The sole question in this case is, whether school trustees have authority in any year, before a copy of the revised assessment roll of that year has been transmitted to the clerk of the municipality, to impose and levy a rate for school purposes, upon the assessment roll of the preceding year.

The learned judge in the court below has taken great pains to review the common school acts in his judgment, but with great deference to his opinion, we have been unable to adopt his conclusions.

We think the error into which he fell arose from making the analogy between municipalities and trustees, and township collectors and collectors under warrants of trustees, identical, thus restricting the common school acts by acts not necessarily affecting them.

It is clear that school trustees may themselves, or through the intervention of the municipality, provide for the salaries of teachers and all others expenses of the school, in such a manner as may be desired by a majority of the freeholders and householders of the section at their annual meeting, and shall levy by assessment upon taxable property in the section such sums as may be required ; and should the sums thus provided be insufficient they may assess and collect any additional rate for the purpose; and that any school rate imposed by trustees may be made payable monthly, quarterly, half-yearly, as they may think expedient.

Many of the requirements of a school admit of no delay.

The peculiar provisions respecting teachers demand great promptness in the payment of their salaries: repairs to schools houses must be made when required. These may be sudden and unexpected. To oblige trustees, or those entitled to payment, to wait till the rolls of the year were made up, would be productive of great inconvenience, and if the law had been less clear than it is, we should not have felt justified in putting a stop to a practice which has, we learn, hitherto obtained, unless on grounds admitting of no doubt.

The general principle is, that levies for municipal purposes shall be made upon the revised assessment of the year in which they are made. It is true that one rate for the year is only struck by the municipal authorities; but suppose a sheriff got an execution either at a suit of the Crown or of a municipality in the month of January, would he be justified in delaying to levy until the revised assessment roll of that year was completed and a certified copy given to the municipality?

So, if the requirements of a school section created a necessity for levying a rate, would the trustees be excused from performing their duty by saying we must wait till the assessment roll of the year is completed before we can act? The obvious answer would be, there is the last revised assessment roll, it is available for the purpose until the new one is made.

On reading the 36th section we find that no township council shall levy and collect in any section during one year more than one school section rate, except for the purchase

of a school site or the erection of a school house, and no council shall give effect to any application of trustees for the levying or collecting of rates for school purposes unless they make the application to such council at or before its meeting in August of the year in which such application is made.

But the 12th sub-sec. of sec. 27 authorises the school trustees to employ their own lawful authority as they may judge expedient for the levying and collecting by rate all sums for the support of their school, for the purchase of school sites, and the erection of school houses, and for other purposes authorised by the act to be collected.

It is to be noted, that the legislature did not confer on the trustees the power to apply to the township council at any time they chose to levy rates; but at or before its meeting in August, and then only for one rate, except *for the purchase of a site, or the erection of a school house*. Suppose a second rate for a site or a school house were applied for in a part of the year from January to August, would not the council be bound to levy it? During this period there would be but the existing roll to use for the assessing of this rate.

The restriction to one rate, and the exceptions in regard to the rates authorised to be levied by the municipality for school purposes, lead us to infer that when the trustees chose to exercise their own authority to levy, they were not restricted, and might levy oftener than once for the payment of teachers and for the other purposes mentioned in the 27th section.

In the case of an arbitration between the trustees and a teacher, the arbitrators may levy, but the trustees are bound to do so; for by the 23 Vic. cap. 49, in case they wilfully refuse or neglect, for one month after publication of award, to comply with, or give effect to the award, they shall be held personally responsible for the amount awarded, which may be enforced against them individually by the warrant of the arbitrators. But if they are thus bound at any time to exercise their power to levy, it must necessarily be done upon the existing assessment roll. None of the authorities cited touch this question as raised; but looking at the scope of the acts relating to common schools, the duties imposed

upon trustees, the exigencies of schools, and the powers conferred upon trustees to levy rates, we are of opinion that trustees are not restricted to making one levy, but may levy at any time as need requires it; and may use, and can only use, the last existing revised assessment roll for imposing the required rate. The appeal will therefore be allowed.

Appeal allowed.

VIDAL V. BANK OF UPPER CANADA.

Affidavit of merits, proper form of—Must disclose defence, except in interpleader cases.

The proper form of the general affidavit of merits is, that the defendant has "a good defence to the action on the merits." *Held*, therefore, that an affidavit by the attorney which stated that in his "opinion the defendants had a sure and certain defence legally and equitably" was insufficient.

Held, also, that on an application to set aside a verdict and grant a new trial on the ground of merits, the affidavit must disclose what the merits are. But *held*, that in an interpleader issue it is not necessary to set out the merits, inasmuch as the very issue discloses what the defendant's claim is.

An interpleader to try whether the goods seized by the sheriff of the county of Lambton on the 12th of October, 1864, under a *fi. fa.* tested on that day and issued out of this court upon a judgment recovered by the Bank of Upper Canada against Theodore Baron Jasmund, were, or some part thereof was, at the time of the seizure, the property of the now plaintiff as against the bank.

The cause came on to be tried by Mr. Justice John Wilson at the last Sandwich assizes, when an agreement made the 17th of October, 1863, between the plaintiff as executor of the late Vice-Admiral Vidal, deceased, and Baron Jasmund, was put in for the plaintiff and proved, by which the plaintiff agreed to let Jasmund the house and property of the late Admiral Vidal, on the river St. Clair, in the township of Moore, for three years from the date of the agreement, and to sell to him the personal effects of the late Admiral Vidal at an appraised value, to be paid on the 1st of January, 1865; and it was expressly agreed that the whole of such personal effect should remain the sole property of the plaintiff until such payment, and Jasmund should be a tenant at will of the said personal effects. It was also provided that

if the plaintiff did not make the lease Jasmund should not be bound to purchase the personal effects, and in case he did not purchase that he should return the same in their present condition on demand.

It was then proved that the personal effects had been appraised, and that they had not been paid for by Jasmund.

No one appeared for the defendants, and a verdict was giving for the plaintiff.

G. D'Arcy Boulton, for the defendants, obtained a rule *nisi* upon the plaintiff to show cause why the verdict should not be set aside and a new trial granted without costs on the ground that the cause was tried in the absence of the defendants' counsel, or for a new trial on the merits, and on grounds disclosed in affidavits and papers filed.

The following facts appeared by the papers and affidavits filed : that venue was originally laid in the county of Lambton ; that by judge's order of the 3rd of April last the venue was, at the instance of the plaintiff, charged to the county of Essex ; that the defendants afterwards obtained a judge's summons calling on the plaintiff to shew cause why the trial of this issue should not be postponed ; and why the order of the 3rd of April should not be varied by changing the venue back again to the county of Lambton ; that an order was, upon the 8th April, made enlarging such summons to be disposed of before the judge at *nisi prius* ; that a notice was served by the defendants' attorney upon the plaintiff's attorney on the 13th of April, stating that the defendants could not take the issue to trial at the Essex assizes on the 17th of April on account of the absence of a material witness, and that they would apply under the order of the 8th of April to postpone the trial of the cause, and to remove the venue to the county of Lambton. The defendants' attorney stated in his affidavit that the court at Sandwich opened on Monday the 17th of April ; that he prepared on the 15th to leave Sarnia for Sandwich to attend to this cause but he was prevented from going down ; that on the afternoon of the 15th he telegraphed to Mr. Worthington, a barrister at Windsor, who, he thought, would be at the assizes, to get this cause postponed till the deponent's arrival ; that on the 17th he took the first conveyance from Sarnia

to Sandwich, the river steamboat, and he arrived at Sandwich about five o'clock in the afternoon; that he would have arrived three hours earlier if the boat had not been detained by stress of weather; that the fact of his telegram and of his detention were explained at the time and a postponement was asked for, but it was refused and the case was forced on to trial; that no defence was made at the trial on account of his absence; that he was thoroughly acquainted with all the transactions out of which this action arose, *and in his opinion the defendants had a sure and certain defence legally and equitably*, and would secure a verdict in their favour if a trial were granted.

The affidavit filed for the plaintiff was made by Mr. Kerr, one of the firm of attorneys for the plaintiff. It stated some of the preceding facts, and that one of the plaintiff's witnesses represented to the deponent he could not remain over the 17th of April at the assizes, and that the plaintiff could not safely have proceeded to trial without his evidence; that he had specially retained counsel in this cause, who had informed the deponent that he, the counsel, must leave Sandwich for Cornwall on the evening of the 17th of April; that he learned on enquiry that although the boat sometimes arrived at Sandwich by two in the afternoon, it did not generally arrive till after that hour, and sometimes not until five in the afternoon; and that a railway train left Port Huron, opposite Sarnia, every morning at seven o'clock and arrived in Detroit about eleven in the forenoon; that he believed the plaintiff's claim to be just; and he did not believe the defendants had a good defence on the merits, and he had always thought the defendants had contested the plaintiff's claim mainly in the hope of forcing him into some compromise.

M. C. Cameron, Q. C., with him Kerr, shewed cause.— If relief be granted at all it can only be upon the ground of merits; but merits are not properly sworn to here: *Bower v. Kemp*, 1 Dowl. 282; *Lane v. Isaacs*, 3 Dowl 652; *Page v. Smith*, 7 Dowl. 412; *Moore v. Hicks*, 6 U. C. Q. B. 27; *Pardow v. Beatty*, 6 U. C. Q. B. 496; *Reg. v. Baker*, 6 U. C. C. P. 68; *Blackhurst v. Bulmer*, 5 B. & A. 907; *Watson v. Reeve*, 5 B. N. C. 112; *Gwilt v. Crawley*, 8

Bing. 144; *Breach v. Casterton*, 7 Bing. 224; *Doyle v. Fraser*, 5 O. S. 59; *Nash v. Swinburne*, 3 M. & G. 630; *Blogg v. Bousquet*, 6 C. B. 75; *Gunn v. VanAllan*, 5 U. C. R. 573; *Doe Stewart v. Yager*, 5 U. C. R. 584.

Boulton supported the rule.—The decisions in this country are opposed to the English decisions as to the requirements of the affidavit of merits in putting off a trial or in setting aside a verdict. The English cases shew that the general affidavit of merits is all that is required on such an occasion as this; while with us the merits themselves must be shewn. He referred to *Flooks v. Marriott*, 7 L. T. N. S. 363; *Cooke v. Beardsall*, 1 L. T. N. S. 14; *Townley v. Jones*, 8 C. B. N. S. 289. In setting aside a judgment, which has been signed on a specially endorsed writ, the C. L. P. Act requires that the affidavit shall “disclose a defence upon the merits.”

A. WILSON, J., delivered the judgment of the court.

There are two objections to the form and sufficiency of the defendants' affidavit. The first is that the merits are not disclosed; the second is that the prescribed form of general merits has not been followed.

In *Bower v. Kemp* an affidavit that the defendant had “a good and meritorious defence” was held insufficient; but an amendment of it was allowed. In *Lane v. Isaacs* the statement “that he hath merits and good cause of defence to the action” was held defective. In *Page v. Smith*, “that he had a good, substantial, and available defence to the action” was also held insufficient. Some other instances of the like nature are also stated in Arch. Pr., 11 ed., 978-9, the proper form of statement being that the defendant has “a good defence to this action upon the merits.” This form has been the invariable one required for many years, and perhaps no part of the practice is so well known or can be so easily followed as “the affidavit of merits.”

The defendants, however, do not follow it; their attorney, the deponent, says, “he is thoroughly acquainted with all the transactions out of which this action arose, and in his opinion the defendants have a sure and certain defence legally and equitably and will secure a verdict in their

favour if a new trial be granted." A sure and certain defence, particularly when it is both legal and equitable, means, perhaps, one upon the merits ; but the deponent has gone a long way about to describe it ; and yet according to the authorities he has not described it, for he has not followed the well stated formula : for it is not quite clear that even an *equitable* defence, however sure and certain it may be, taking equitable in its more technical sense, must necessarily be a good defence upon *the merits* ; and, therefore, it is better to adhere to the plain and well recognized form of practice ; but this affidavit does not say that this defence is *to this action*, and this omission, it has been held, will make the affidavit objectionable : *Tate v. Bodfield* (3 Dowl. 218). Then as to the merits not being set forth, it is too late for us now to depart from the practice which has prevailed here for many years past of requiring the merits to be disclosed in the affidavit ; and even if we were to do so, we are not at all satisfied that it would be proper to do it ; for we rather think that our own practice in this respect is better than the English practice, and that there is quite as much reason for requiring the merits to be disclosed after a verdict as after a judgment signed on a specially endorsed writ. The C. L. P. Act, therefore, is rather a testimony to the reasonableness of our practice, which we are not therefore disposed to alter. If the merits were disclosed we might be able to form an opinion, as well as the deponent, whether the defendants have or have not a sure and certain defence ; and whether they will or ought to secure a verdict in their favour, and by what means this certainty of trial by jury was to be effected ; but such general statements are not sufficient in ordinary cases after a trial.

If in this form of action, then, an affidavit of merits must be produced as a condition for getting the relief asked for, we should have to hold that the defendants had failed to furnish the necessary affidavit both in substance and form.

But we doubt whether such an action as the present is to be governed by the rules which apply in other actions ; for instance, in an action on the common counts, to which 'never indebted' is pleaded, an affidavit of merits may mean that the debt was not in fact contracted at all, or not contracted

by the defendant, or that the person who professed to contract it for the defendant had not authority to do so, or that there was no writing to perfect the agreement, or that it was void for illegality; and it is right the court should know which of all these defences was relied upon, and how it was proposed to make it out. So even in the case of payment pleaded, or a release, the court should know what the payment was, or when it was made, or when the release was granted; and so the like rule might be applied to other forms of action, and to other pleadings, or notice of title and defence.

But in this interpleader the court knows that the defence which is to be set up is that the defendant's claim that the goods in question were and are the property of Baron Jasmund, the execution debtor, and as such are liable to their execution; and they know that this claim has been deemed by a judge of the superior courts a fit one to be tried between the defendants and the present plaintiff, who asserts the goods were and are his property, and not the property of Jasmund, the execution debtor.

Now what more than this could the defendants disclose by an affidavit? and why is it more to be sworn or certified to, or less to be tried now than it was before?

If it were a fit case to be sent for trial specially before, it is not the less fit to be tried now; and we think the reasons which prevail for requiring an affidavit of merits, which shall disclose what these merits are in ordinary actions, do not exist for such an affidavit or for so precise a one in an issue of this nature.

Our discretion for interference will therefore be regulated by other considerations, and we think that in this case it would not be satisfactory to have the issue disposed of, as it was without a trial, in the absence of the defendant's counsel, and when it was known by the plaintiffs' counsel that the question of postponing the trial altogether had been specially reserved for the decision of the learned judge at *nisi prius*, and that it was very probable a trial might not then take place at all.

We do not, however, see any fault in the course which the learned counsel for the plaintiff pursued; but we think

relief should be granted to the defendants, and therefore the rule will be absolute, setting aside the verdict on payment of the costs by the defendants within one month, which, on the facts disclosed, we think the attorney ought to pay, otherwise the rule will be discharged.

Rule absolute for new trial on payment of costs.

FAREWELL V. GRAND TRUNK RAILWAY COMPANY.

1st count of declaration alleged *payment by plaintiff to defendants of the legally authorized fare demanded by defendants* for plaintiff's passage from O. to T. and back again from T. to O., and the receipt by defendants thereof; that plaintiff having been carried to T. entered the train there to be transported back to O., of which defendants had notice, yet defendants, contrary to the statute, would not transport plaintiff to O., but ejected him from their cars.

2nd count.—Plaintiff, being a *passenger* on a train of cars of defendants running from T. to O., was *by the servants of defendants* employed on said train forcibly and wrongfully put out of same before it reached O., though no one entitled on defendants' behalf to demand or receive any fare or ticket had demanded same from plaintiff, and though no servant of defendants on said train *wearing on his hat or cap any badge* to indicate his office presented himself, to whom plaintiff could pay such fare or produce such ticket.

3rd count.—Plaintiff was by force and violence put out of cars of a passenger train of defendants, by the conductor and servants of defendants, neither the former nor the latter then wearing on his hat or cap any badge indicating his office.

2nd plea to 1st count.—That at the time when, &c., defendants were in the habit of issuing at a reduced rate to persons travelling between O. and T. who desired to return *within two days*, return tickets, dated on day of issue and marked "good for day of date and following day only;" that on a passenger presenting such return ticket to the conductor the latter would take up half of said ticket for the passage from O. to T., and the passenger retained the other half for the passage from T. to O.; that plaintiff bought from defendants such a return ticket marked (as above described), paying therefor the reduced rate, and did upon the same proceed to T., presenting to defendants' conductor said half of such return ticket for the passage from O. to T.; that subsequently and *six days* after the date of said ticket plaintiff presented to the conductor on defendants' train going from T. to O. the said return ticket, and upon said conductor refusing to accept same and requiring plaintiff to pay his fare to O., plaintiff refused to pay the lawful fare or any fare to defendants; whereupon said conductor put plaintiff out of the cars, &c.

2nd plea to 2nd count.—That at the time when, &c., defendants had a conductor in charge of said train, who was well known to plaintiff, *and who carried and wore a badge indicating his office*, and that said conductor demanded, &c., and plaintiff refused, &c., whereupon said conductor stopped, &c., and put plaintiff off, &c.

Held, on demurrer, 2nd and 3rd counts good: as to the 2nd, that although in the case of a trespass, where a forcible, wrongful and immediate act is charged, as in the present case, the usual and proper allegation is that the *defendants* did the act, or that *they* did it by their servants; yet that the servants of defendants possessing and exercising on behalf of defendants the power to remove plaintiff, the count sufficiently charged an act against defendants, which their servants in course of their employment might law-

fully perform; that the allegation that plaintiff was a *passenger* shewed *prima facie* that he was lawfully there; that plaintiff was not obliged to shew that he had a ticket or was ready and willing, or offered to pay his fare, or that no fare was demanded, the action not being for a refusal to carry him, but for turning him off the train, to justify which *defendants* should shew a demand of the fare; and that plaintiff, complaining of a mere trespass, was not obliged to allege that a person wearing a badge and authorized by defendants and known to plaintiff as being authorized was present to receive the fare.

Held, also, 2nd plea to 1st count good: that defendants were not obliged to deny that plaintiff legally paid his fare, for they could not properly have done so, *having admitted*, as they had, *the purchase by plaintiff from defendants* of a return ticket to and from T.; that defendants had shewn a good contract not inconsistent with their statutory duty; and that that contract being voluntary on the part of the plaintiff, and beneficial to him in its nature, it was not necessary that either the contract itself or its terms should have been embodied in a by-law in order to make it legal; that it was unnecessary to deny that defendants had charged more than 2d. per mile, as it did not appear that they had done so; that defendants could lawfully impose a condition of returning within a specified time, because it was a special and reasonable bargain, and optional with the plaintiff to enter into or not, and that, therefore, the ticket issued by defendants to plaintiff constituted a valid contract between them, *and was binding in its terms upon plaintiff*.

Held, also, 2nd plea to 2nd count bad, for not alleging that the conductor wore the badge "upon his hat or cap," or on some conspicuous part of his person or dress, or so as to be seen by passengers; and that 2nd plea to 3rd count, which was the same as 2nd plea to 2nd count, was *not* objectionable on this ground, for that the count not shewing any justifiable cause for plaintiff being in the train, defendants could no doubt put him out, and their officer was not, therefore, obliged to assume the badge for that purpose; but,

Held, that neither plea shewed a sufficient justification for the act complained of without the allegation that plaintiff was *requested to leave* the cars before he was forcibly ejected therefrom.

The pleadings in this case were as follows:

The first count stated that the plaintiff had duly paid to the defendants the fare legally authorised, and by the defendants demanded for the passage of the plaintiff from the defendants' station at Oshawa to the defendants' station at Toronto, and thence returning from the said station at Toronto to the said station at Oshawa, and the defendants had received the same; and the said stations were usual stopping places for receiving and discharging way passengers from the defendants' trains; and the plaintiff having been transported by the defendants from the said station at Oshawa offered himself at the said station at Toronto, which was the place of starting of the trains of the defendants, at a reasonable time previous to the regular hour for the starting of such trains, and entered a passenger train of the defendants, being part of a train of defendants then about to start

from the said station at Toronto and to stop at the said station at Oshawa, for the purpose of being transported from the said station at Toronto to and discharged at the said station at Oshawa, of which the defendants had notice; yet the defendants, contrary to the statute in his behalf, would not transport the plaintiff from the said station at Toronto to the said station at Oshawa, but although they did transport him a short distance from the said station at Toronto, yet they refused to transport him to or discharge him at the said station at Oshawa, and wrongfully put him out of their said cars.

The second count stated, that the plaintiff, being a *passenger* on one of the cars of a passenger train of the defendants, going from the defendants station at Toronto to the defendants station at Oshawa, was by *the servants of the defendants* then employed in the said passenger train, forcibly and wrongfully put out of the said cars before the same had reached the said station at Oshawa, although no one entitled on behalf of the defendants to demand or receive from the passengers any fare or ticket had demanded from the plaintiff any fare or ticket and although no servant of the defendants employed in the said passenger train wearing upon his hat or cap any badge to indicate his office presented himself, to whom the plaintiff could pay such fare or produce such ticket.

The third count stated, that the plaintiff was by force and violence put out of one of the cars of the defendants in a passenger train of the defendants by the conductor of the train and the servants of the defendants then employed in the said passenger train, neither the conductor nor any such servants then wearing upon his hat or cap any badge to indicate his office.

The second plea to the first count stated, that at the time when &c., the defendants carried passengers between Oshawa and Toronto, and when passengers going to Toronto from Oshawa desired to return within two days, the defendants carried such passengers at a lower rate and fare than was charged to persons who did not return to Oshawa within such period; and the defendants issued to such passengers so desiring to return within that time return tickets, which were dated on

the day they were issued to passengers, and were, except as to the date and number of tickets (which dates and numbers were omitted), in the words and figures following, that is to say :

GRAND TRUNK RAILWAY,
RETURN TICKET,
G OSHAWA
TO
TORONTO,
FIRST CLASS.

GRAND TRUNK RAILWAY,
TORONTO,
TO
R OSHAWA,
FIRST CLASS.

Good for day of date and following day only.

That the course and practice of the defendants was at and before the time when, &c., that on the passenger presenting such a return ticket to the conductor on any of the defendants passenger trains, the conductor would take up the half of the said ticket for the passage of the passenger from Oshawa to Toronto, and the passenger retained the other half which on the face of it was for the return passage from Toronto to Oshawa, and all said tickets were issued on the express condition shewn on the face of them, all which the plaintiff well knew and had notice of, and so having such knowledge and notice, the plaintiff bought and the defendants at his request sold to him a return ticket of the description named, and which ticket was dated on the day it was sold and issued to the plaintiff, and had thereon the express stipulation and condition mentioned, that it was good for the day of its date and the day following only ; and the plaintiff paid therefor the reduced rate charged for said return ticket by the defendants, all of which the plaintiff well knew and had notice of ; and the plaintiff did upon the said ticket and within the time mentioned thereon proceed to Toronto and presented to the defendants' conductor the said half of the said return ticket for the passage of the plaintiff from Oshawa to Toronto ; and afterwards and after the expiration of the time mentioned on the said ticket had

elapsed, that is to say, to wit, six days after the date of the said return ticket, the plaintiff went upon the defendants' train proceeding from Toronto to Oshawa, and upon the defendants' conductor of the train asking the plaintiff for his ticket the plaintiff presented the said return ticket which was so issued and received by the plaintiff and dated more than two days before the day on which it was presented to the conductor; and upon the plaintiff so presenting said ticket, the conductor refusing to accept the said ticket and requiring the plaintiff to pay his fare to Oshawa aforesaid, he (the plaintiff) refused to pay the lawful fare or any fare to the defendants; and thereupon the conductor so in charge of the said train put the plaintiff out of the defendants' cars, at a usual stopping place near a dwelling house, having first stopped the train and using no unnecessary force, which are the grievances complained of in the first count.

Second plea to the second count: That at the time when, &c., the defendants had a conductor upon and in charge of the said train, upon which the plaintiff entered as in the first count mentioned, which conductor was as such well known to the plaintiff, and who carried and wore a badge indicating that he was such conductor, and that the said conductor demanded payment of the lawful fare payable by those travelling upon and using the defendants' railway between Toronto and Oshawa, to which place the plaintiff was then proceeding; that the plaintiff refused to pay the said fare, or any fare whatever, and thereupon the defendants' conductor stopped the said train, at a usual stopping place, near a dwelling house, and put the plaintiff off the said train of cars, using no unnecessary force, which are the grievances in the second count mentioned.

Third plea, being the second plea to third count, the same as the next preceding plea.

The defendants demurred also to the second count, for the following causes:

1. That it contained no averment that the plaintiff was provided with a ticket, or was ready or willing, or offered on any condition to pay the lawful fare payable by him to the defendants.

2. That it did not disclose any cause of action against the defendants.

3. That it did not show that the plaintiff was lawfully upon the train, and with said cars ; nor did it deny that a person wearing a badge, and authorized by the defendants, and known to the plaintiff as being authorized, was present to receive the fare ; nor did it allege that no fare was demanded from the plaintiff.

The demurrer to the third count stated exactly the same objections to it as were stated to the second count.

The plaintiff demurred to the second plea to the first count, for the following causes :

1. That it contained no denial on the defendants' part of the allegation in the first count, that the plaintiff had paid the fare legally authorized and by the defendants demanded for the passage in question.

2. That the defendants were by law bound to convey to the plaintiff, as alleged in the first count, on payment of the fare, and no contract between the parties was shown varying the statutory duty of the defendants.

3. That it was not shown that the conditions alleged to have been attached to the issue of the ticket were legal, or were embodied in any by-law duly passed and approved as required by law.

4. That the alleged conditions were illegal, inasmuch as the defendants could not lawfully charge more than two pence a mile, and it was not denied that the fare paid exceeded two pence for each mile, from Oshawa to Toronto ; nor was it alleged that the defendants received the excess for any other purpose than for the passage of the plaintiff from Toronto to Oshawa ; nor was it alleged that they refunded or returned such excess to the plaintiff.

5. That the defendants having accepted payment for the passage to Toronto and back to Oshawa, as alleged, could not lawfully impose the condition that the plaintiff should return within a specified time.

The plaintiff also demurred to what was called the defendants' second plea to the second and third counts.* The

* There was no plea to the second and third counts, but there was a second plea to the second count and a second plea to the third count, both of which pleas were alike, and they were separate pleas, not one plea.

cause of demurrer was that it was not alleged that the conductor or servants of the defendants displayed their badges, or wore them in the manner required by law.

C. S. Patterson, for the plaintiff, referred to the Consol. Statutes of Canada, ch. 66, secs. 96, 97.

The second plea does not answer the first count; it does not deny that the plaintiff paid his legal fare; it sets up a series of transactions respecting a return ticket; but it does not show that any valid agreement was made between the plaintiff and the defendants as to his carriage, different from that which is mentioned in the count.

The mere statement of the terms of the ticket does not constitute an agreement: *Peek v. North Staffordshire R. Co.*, 10 H. L. 473, S. C. 9 Jur. N. S. 914; but any agreement should have been specially alleged: *The Queen v. Frere*, 4 E. & B. 598; *The Great Northern R. Co. v. Harrison*, 10 Exch. 376; *Wyld v. Pickford*, 8 M. & W. 443; *Rumsey v. The North Eastern R. Co.*, 10 Jur. N. S. 208; *Stewart v. London & N. W. R. Co.*, 10 Jur. N. S. 805; *Van Toll v. The South Eastern R. Co.*, 12 C. B. N. S. 751, S. C. 8 Jur. N. S. 1213; *Smith v. Cuff*, 7 M. & Sel. 160.

If the conditions in the ticket are relied on, the defendants must establish that they were imposed legally by a by-law under sec. 20 of the statute; but this they have not done.

The second count is sufficient: see secs. 95 & 106 of the statute. The allegation that the servants of the defendants did the act complained of, is a sufficient allegation to charge the defendants for the act: *Giles v. The Taff Vale R. Co.* 2 E. & B. 822.

The third count is very general in form, but it discloses a sufficient cause of action.

The second plea to the second count, and the second plea to the third count, are both objectionable for not stating that the conductor wore a badge in his hat or cap, or that he had one in sight.

M. C. Cameron, Q. C., for the defendants.

The second plea to the first count does show that the ticket was a contract between the parties.

Sec. 95 of the act must be read as personal to the officer; but sec. 106 shows the passenger must pay his fare.

If the servant did the act complained of, and if he had no badge, it was a wilful act of his own, for which he must be individually responsible, but the defendants are not liable: *Eastern Counties R. Co. v. Broom* 6 R. C. 743; *Redfield on Railways*, 33.

The second count does not show the plaintiff to have been lawfully a passenger, or that he was ready to pay or offered to pay his fare.

The third count does not show the plaintiff was a passenger at all.

A. WILSON, J., delivered the judgment of the court.

The sections of the act to be considered are the following:

Sec. 95.—“Every servant of the undertaking employed in a passenger train, or at a station for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, and he shall not without such badge be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, nor meddle or interfere with any passenger or his baggage or property.”

Sec. 96.—“The trains shall start and run at regular hours, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains.”

Sec. 97.—“Such passengers and goods shall be taken, transported and discharged, from, and to such places, on the due payment of the toll, freight, or fare legally authorized therefor.”

Sec. 106.—“Any passenger, refusing to pay his fare, and his baggage, may by the conductor of the train and the servants of the company be put out of the cars at any usual stopping place, or near any dwelling-house, as the conductor elects; the conductor first stopping the train, and using no unnecessary force.”

Sec. 20.—“Tolls shall be from time to time fixed and regulated by the by-laws of the company, or by the directors if they be authorized by the by-laws, or by the shareholders at any general meeting ; and may be demanded and received for all passengers and goods transported upon the railway ; and shall be paid to such persons and at such places near to the railway in such manner and under such regulations as the by-laws direct.”

Sec. 25.—“All or any of the tolls may by any by-law be reduced and again raised as often as deemed necessary for the interests of the undertaking, provided the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to the tolls.”

We think that the ticket set out in the second plea must be taken to be a contract between the plaintiff and the defendants for the special purpose and upon the terms which are contained in it.

In *Shaw v. The York and North Midland Railway Co.* (13 Q. B. 347), a receipt paid for the carriage of horses had the following memorandum at the foot :—“This ticket is issued subject to the owner’s undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages while travelling, or in loading or unloading ;” and the court held that it was “clear that the terms contained in the ticket given to the plaintiff at the time the horses were received, formed part of the contract for their carriage between the plaintiff and the defendants ; and that the allegation in the declaration, that the defendants received the horses to be safely and securely carried by them, which would throw the risks of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket.” And *Austin v. The Manchester R. R. Co.* (10 Com. B. 454) ; *Carr v. The Lancashire and Yorkshire Railway Co.* (7 Exch. 707) ; and *Walker v. The York and North Midland Railway Co.* (2 E. & B. 750), all establish the same conclusion.

These cases were decided before the Railway and Canal Traffic Act of 1854 was passed in England, the 17 & 18 Vic. ch. 31 ; and this statute was designed to put an end to so great and frequent an abuse of power by these public companies. The later cases, down to the case before the House of Lords of *Peck v. The North Staffordshire Railway Co.* (9 Jur. N. S. 914), which are summed up and commented on in that leading case, confirm the validity of the prior cases on this point.

These decisions, and the statute referred to, apply only to the carriage of goods ; but in principle the general law pronounced is just as applicable to the carriage of passengers.

The cases which were cited in the argument in 10 Jur. N. S. 208 and 105, were actions which were brought for the conveyance of passengers.

In England no special contract is now valid for the carriage of goods unless it be reasonable, and be signed by the party to be bound by it ; but a special contract, by which the party assents to have his goods carried without any recourse at all upon the carrier for neglect, upon the condition of a reduction of the price below that which would be the reasonable remuneration for carrying at the carrier's risk on his common law liability, would seem not, even under that very stringent statute, to be an unreasonable condition ; (per Blackbourne, J., 9 Jur. N. S. 920 ; per Lord Wensleydale, 9 Jur. N. S. 936) ; for in such a case the party would have the option of dealing with the carriers according to their strict legal liability, upon one measure of remuneration ; or of dealing with them upon a special or restricted liability, in consideration of a reduced rate of compensation.

In *Rumsey v. The N. E. Railway Co.*, Erle, C. J., said : "The plaintiff was going from Scarborough to Whitby, and wished to take a portmanteau with him, and he knew that the ordinary fare was nine shillings ; but if he chose to go without his luggage, by an excursion train, five shillings only would be charged. He then obtains a five shillings ticket, by which he holds out to the company that he waives his rights to luggage, and nevertheless contrives to put his luggage into the train. The act does not apply to a

passenger who renounces the right [to take his luggage with him] that he may go by a cheaper train."

Williams, J., said: "I do not see anything anywhere that prohibits the making of a bargain by which a railway company, on consideration of taking passengers at less than their ordinary fare, shall require their luggage to be withheld."

In *Stewart v. The London and N. W. Railway Co.*, a case of somewhat similar nature, Bramwell, B., said: "The fares in this case [an excursion train] are much lower than in other cases, and the plaintiff might have refused the terms on which the ticket was issued."

There can be no doubt, then, that the ticket constituted a valid contract between the plaintiff and the defendants, and that such terms were binding on the plaintiff. They were and are reasonable, so far as they may be of any consequence, and such a bargain is not in any place prohibited by our law, statute or common law.

We shall take up the causes of demurrer separately to the different pleadings.

The first cause of demurrer to the second plea to the first count is not entitled to prevail. The defendants are not obliged to deny that the plaintiff legally paid the fare; and they could not do so properly, and therefore ought not to have denied it; for they admit that the plaintiff bought from the defendants a return ticket for his passage from Oshawa to Toronto, and from thence back to Oshawa.

We think, as to the second cause of demurrer, the defendants have shown a good contract between the parties not inconsistent with their statutory duty.

We think that on a special contract between the parties, such as is here disclosed, it was not necessary that either the contract or the terms of it should have been embodied in a by-law. The plaintiff cannot himself deviate from his common law or statutory claims, and after waiving them fall back upon his strict rights whatever these may be: he has made a contract and a perfectly legal one and he must abide by it.

As to the fourth objection; it does not appear that the defendants did charge more than two pence per mile; there

was no necessity, therefore, of denying it, nor of doing anything with the supposed excess : if the plaintiff intended to ground his action upon an excessive charge of fare demanded by the defendants, he should have done so ; but we do not see how it now becomes material even if it were true.

The fifth objection we have in effect already disposed of : we think the defendants could lawfully impose the condition of returning within a specified time, because it was a special and reasonable bargain, and for which condition it must be assumed the plaintiff had received full value : it is not alleged that the time was too restricted and unreasonable, if that could have helped the plaintiff ; but it is put on the widest possible ground that the plaintiff in such a case should be at liberty to return upon this same ticket in ten years after this, if he so desire it. It is sufficient to say that this is not his contract and we cannot give effect to it.

The defendants have demurred to the second count for various causes. It is alleged by the defendants that the count discloses no cause of action.

The count charges that the plaintiff, being a passenger on the defendants' train, was "*by the servants* of the defendants then employed in the train, forcibly and wrongfully put out of the cars, &c.," instead of charging in the usual and proper manner, that the *defendants* did the act, or that *they* did it by their servants.

The master is liable generally for the negligence of his servant acting in the course of the master's employment, but not for wrongful acts done by the servant wilfully and intentionally.

The act of negligence may be alleged to be that of the master, although it was in truth the act of the servant ; for the legal effect of it is, that it was the master's act : *Brucker v. Fromont* (6 T. R. 659) ; or it may be alleged to be the act of the servant of the defendant, then being and acting therein as the servant of the defendant : *Patten v. Rea* (2 C. B. N. S. 606). As Ashurst, J., said in 6 T. R., "it may be stated in the declaration either way, though it is certainly most convenient to state the fact as it really happened."

In *Seymour v. Greenwood* (6 H. & N. 359), the defendant was charged with his own and his servant's negligent and

improper conduct in driving and managing the omnibus in which the plaintiff was a passenger, by means of which the plaintiff was injured; and it was held that the act of the guard in removing the plaintiff from the omnibus forcibly, whereby he was severely injured, was evidence for the jury, as the guard did it under the impression that the plaintiff was drunk; in which case it was his duty to remove him,—that he was acting in the ordinary course of his employment, and so the defendant was responsible. Pollock, C. B., says: “Was the act one which the relation between the guard and the defendant warranted him in doing?” Martin, B., says,—“The act was one which was properly within the scope of the servant’s employment. A great deal has been said as to the act being one which was purely a trespass, but it was nothing more than the guard of an omnibus putting out a person who had misconducted himself,”

In *Roe v. The Birkenhead*, R. Co. (7 Ex. 36) where the Company was sued in trespass for their servants imprisoning the plaintiff, Pollock, C. B., said: “The general rule is, that a master is not liable for the tortious acts of his servant, unless that act be done either by an authority express or implied given him for that purpose by the master. If it had appeared in the present case that the act complained of was one which the Company had legal authority to perform, the act would not have been tortious, and it might well have been put to the jury as having been done by an authority given by the Company; but there was no evidence whatever that the act was of that character, and therefore, as the case stands, we must take it to be a tortious act.” Although in the present case a trespass, a forcible, wrongful, and immediate act is charged to have been committed by the servants of the defendants, yet if they had the power in the course of their employment, as such servants, to remove the plaintiff, I think the count may be maintained as it is, as well as if the act charged were a consequential instead of an immediate wrong. If it appeared from the count, or if it could be inferred, that the defendants’ servants could not exercise such a power of removal at all, judgment might be given against the count upon demurrer, or judgment might be arrested; but we know

that they do possess, and that they do exercise such powers on behalf of their employers, and therefore we must hold the count does sufficiently charge an act against the defendants, which the servants of the defendants in the course of their employment might lawfully perform. In the *Eastern Counties Railway v. Brown*. (6 Exch. 314) the declaration was against the Company, as the defendants, in trespass, and we think it would have been better if it had been so here. If it had appeared by the count that the plaintiff was removed because of the dispute about his fare and his refusal to pay it, it would have been quite certain that the servants assuming to remove in such a case, would have been acting within the scope of their authority; but the count does not allege that this was the cause of the removal; and from anything we can see, all that portion beginning at "although no one entitled, &c.," might have been omitted without the slightest change in the cause of action, or in the proof at the trial.

The allegation that the plaintiff was a passenger in the car shews *prima facie* he was lawfully there. In *Seymour v. Greenwood* it was alleged the plaintiff was a passenger for reward; but whether for reward or not, we do not think matters: in either case the character and purpose in which and for which he was there appears, and that was a lawful one.

We do not think the plaintiff was obliged to shew in his count that he had a ticket, or was ready and willing, or offered to pay his fare, because all about his fare in the manner in which it is stated in the count is, in our opinion, of no consequence: it was time enough for him to pay, or to be ready or offer to pay, or to shew his ticket, when it was demanded of him. If the plaintiff had been suing the Company for refusing to carry him or to take him as a passenger, no doubt he must have alleged an offer or readiness to pay, as in *Benet v. The Peninsular Steamboat Company*, (6 C. B. 775) and in many other precedents. But the case is jurt reversed when the Company assume to turn a passenger off for non-payment: they must shew that they first demanded it to justify their proceeding. The other exceptions to this count, as to whether a badge was worn or not, or whether

the conductor was known to the plaintiff or not, cannot prevail, because the plaintiff complains of a mere trespass, and he was not obliged to put all these circumstances in his declaration.

As to the second plea to the second count the plaintiff has objected to it, because the plea does not state the conductor or servants of the defendants displayed their badges, or wore them in the manner required by law.

The count, as has been seen, states what appears to have been an act of trespass by the defendants by the acts of their servants.

The plea states, that the defendants had a conductor in charge of the train, who was well known to the plaintiff, and who carried and wore a badge indicating that he was such conductor; that he demanded payment from the plaintiff of his fare; that the plaintiff refused to pay it, and that the conductor put the plaintiff off the car.

The plea does not say, as the Statute provides, that the conductor wore the badge indicating his office "upon his hat or cap," but omits this allegation. Now, the importance of this requirement derives its whole force and efficacy from the enactment itself, as but for the Statute it would not matter in the slightest degree whether there was a badge worn or not; and this enactment is, that such badge shall be worn "upon the hat or cap," and it declares "that he [the officer] shall not without *such badge* be entitled to demand any fare or ticket, or to exercise any of the powers of his office, nor meddle or interfere with any passenger or his luggage or property." There can be no doubt that the intention of the Legislature was that the badge should be worn on some conspicuous part of the person or dress; but this plea does not allege that the conductor so wore his badge upon the occasion; nor does it say even that his badge was in sight, or that the plaintiff knew he had one. How then can the defendants be justified in turning the plaintiff off the cars when the Statute declares that without such badge the officer shall *not exercise his powers nor meddle or interfere with any passenger?*

The Statute, although it professes to be worded very strictly, has not provided that the hat or cap when so badged

is to be or shall be worn on the head : it assumes that such officers will or must have hats or caps, and that they will or must wear them, and wear them on the head, but it does not enact that they shall do so.

In former times arrests were made by the House of Commons by sending the mace by the officer, and this is the practice of the House of Lords now : *Hervard v. Gossett* (10 Q. B. 359) ; and it can scarcely be supposed that an arrest made without a written warrant, or some visible badge of authority, indicating the office of the messenger, would be sustained in law, or be likely to be submitted to.

Bailiffs, constables, policemen, and tipstaffs, are usually furnished with a staff or baton as a badge, which indicates their office ; and in many cases the exhibition of this semblance of power as well as authority is quite as effectual in procuring obedience to the officer as any written warrant could be.

In most cases it has been found that great regard is paid by people generally to some outward visible sign of office, whether it be in the drees, or in the possession of a sword or baton, or other badge ; and, besides this popular reason, there is the further purpose in this case, in the protection of the public from imposition by persons assuming the office of collectors at these stations and on board the cars, where there is so little opportunity in the hurry, and crowd, and excitement, to make enquiry into and ascertain the true character and position of the person who is making a demand for the fares, or who may be threatening to detain the luggage of the traveller until some exorbitant demand is complied with, and when there would scarcely be any possibility of the railway authorities discovering the persons who were presuming to act for them by thus practising on the passengers.

To avoid all this difficulty, and loss, and imposition—for it is as beneficial to the railway companies as it is to the public,—it has been provided that the conductors and such like officers shall be provided with a badge of office ; that they shall wear this badge in the hat or cap as the most conspicuous part for it to be seen ; and that without this badge the officer shall not exercise his powers, nor meddle in any way with the passengers, their baggage or property. No pro-

vision could be plainer or more peremptory in its requirements, and we must give effect to it, although it may not have been very properly set up in this case by the plaintiff; its proper observance, however, will be found to be serviceable both to the companies and to the public.

The third count does not show any justifiable cause for the plaintiff being in the defendants' passenger train, and no doubt the defendant could put him out. The second plea to the third count is, therefore, a good justification for the removal of the plaintiff, although the officer had not a badge at the time, as it cannot be required that the officer shall decorate himself to resist a merely aggressive, immediate, and unwarrantable act such as this is.

There is an objection, however, to the pleas to the second and third counts, which was not noticed in the agreement, and which it is better should be amended if it is still thought worth while to prosecute this very inconsiderable action, in which the merits seem to be, so far as we can judge from the record, entirely with the defendants.

These pleas do not state that the defendants requested the plaintiff to leave the cars before they used force and violence in putting him out. The statute says, that any passenger refusing to pay his fare may be put out of the cars, using no unnecessary force; but this is just the common provision of law in every case of trespass where the trespasser had entered peaceably. We cannot think, then, that the defendants were justified in using force and violence in the first instance against the plaintiff who was peaceably in the cars.

In *Green v. Goddard* (2 Salk. 641) it is said: "There is force *in law* (as distinguished from *actual* force (in every trespass, *p. c. f.*; as if one enters my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *imposition manuum* is an assault and battery, which cannot be justified upon the account of breaking the close *in law* without a request:" *Weaver v. Bush* (8 T. R. 78). So in *Polkinhorne v. Wright* (8 Q. B. 196) it is said: "There is a manifest distinction between endeavouring to turn a man out of a house or close

into which he has previously entered quietly, and resisting a forcible attempt to enter: in the first case a request is necessary, in the latter not."

In the case before cited, in 6 Exch. 315, the pleas shewed a request on the plaintiff to leave before he was put out of the carriage. *Blads v. Higgs*, (10 C. B. N. S. 713), shews a request to give up the goods before the defendant took them from the plaintiff. As the rule and principle are universal, we think the pleas are not sufficient without this averment; and as we have no doubt a demand was made, it should be allowed to be added.

In our opinion the defendants are entitled to judgment on the demurrer to the second plea. We think that the second and thirds counts are sufficient; that the plea to the second count is insufficient for not alleging that the conductor had the badge of his office on his hat or cap, or that he wore it in some conspicuous part of his person or dress, or so as to be seen by passengers at the time when, &c., if even then would have sufficed; that the plea to the third count is not objectionable for this cause, but that both these pleas to the second and third counts do not show a sufficient justification to do the act complained of without a previous request having been made upon the plaintiff to leave the cars before force and violence were applied to him to put him out. We think the defendants should, if the plaintiff persist in the suit, be allowed to amend their plea to the third count, averring a prior request if they desire to do so, and to amend the plea to the second count in the like respect if they can better it, as well as in averment as to the badge; and that such amendments as to the request should be made without costs, as no objection was made by the plaintiff to the want of it; but if any greater amendment is desired, it should be upon payment of costs.

THE CORPORATION OF NORTH GWILLIMBURY V. MOORE ET AL.

Promissory note—Payment; evidence of—Right of beneficial holder to sue in name of representatives of payee—Municipal corporations may take any rate of interest.

Defendants made the note sued on, payable to D. or bearer, for \$348.40, with interest at 15 per cent. The note was made to D., and delivered to him as Reeve of the township, for money loaned by the latter, and was left with S., the treasurer, for plaintiffs. Subsequently the defendant Moore gave his own note for \$278 payable to S. (but not to order), S., without authority from plaintiffs, giving up to him the former, the difference between the two notes being a loan to S. himself, though included in defendants' note. S. having died, his accounts with plaintiffs were adjusted by the latter with his surety, who was charged with the note sued on, which he arranged by giving the note for \$278 and his own note for \$70; and a balance of \$183 was, as agreed to by plaintiffs, paid by, and a receipt therefor given to him in full of plaintiffs' claim against S. After this settlement plaintiffs by a resolution in council recognized this note for \$278 as amongst their existing securities, thus shewing that they were aware of its having been received in substitution of the note sued on.

Held, that taking the whole transaction together there was such a ratification of the acts of S. by plaintiffs in the subsequent adjusting of his accounts with his surety that, coupled with the receipt of the note for \$278 with other notes and money in full satisfaction of all claims on the note sued upon, it was evidence to go to the jury of the payment of this note under a plea of payment.

Held, also, that the plaintiffs could enforce payment of the note for \$278 in the names of the representatives of S.

Held, also, that municipal corporations are not restricted any more than individuals as to the rate of interest to be received upon monies loaned by them, but that they may take any rate of interest agreed upon.

This was an appeal from the county court of the United Counties of York and Peel.

The action was on a promissory note as hereinafter set out.

The pleas were: 1st. *Non fecit*; 2nd. Payment; 3rd. That after plaintiffs became the bearers and holders of the said note they transferred and delivered the same to one Richard Sheppard who then became the bearer and holder thereof, and the defendants afterwards and while the said Richard Sheppard was the bearer and holder thereof, to wit, on the 1st day of January, 1864, paid to said Richard Sheppard a large sum of money, amounting to all the moneys in the said note mentioned, in satisfaction and discharge of the said note, and of all the causes and rights of action therein, and the said Richard Sheppard then received the same in such satisfaction and discharge; 4th. The note void, as reserving a usurious rate of interest.

The plaintiffs joined issue on all the pleas, and also demurred to the fourth and last plea.

The following facts, material to notice, appeared in evidence: On the 1st of January, 1863, defendant made their promissory note, payment to Henry Draper or bearer, one year after date, for \$348 40, with interest at 15 per cent. per annum.

This note was given to Draper, as the reeve of the township of North Gwillimbury, and was, in fact, at the time the property of the township, having been given for money loaned by them to the defendant Moore. The payee had no interest in the note. It was left with the treasurer of the township, Richard Shepherd, for safe keeping for the plaintiffs.

On the 10th April, 1863, the defendant Moore gave his own note for \$278, with interest at 15 per cent., payable to Richard Shepherd and Shepherd gave up to Moore the note sued on, which was made up of the note for \$278 and \$70. These *seventy* dollars, part of the money in the note of \$348 40, were, in fact, money borrowed by Shepherd himself, though included in the note. It is not pretended that Shepherd was authorised by the corporation to give up the note. After the note was given up, Shepherd died, and the corporation claimed from his sureties the full amount of all the moneys, notes and demands which he had in his hands belonging to the corporation; and amongst other notes, for which his sureties were called upon to account and answer, was the note in question. The council appointed persons to go over the whole of the treasurer's accounts, charging him with what he was liable for, and crediting him with what was paid and what was due him for salary, &c., and found due the corporation \$183 40, which was agreed to be accepted as balance due to the corporation in full from the estate of the late Richard Shepherd and his sureties.

In a resolution passed by the council on the 17th of June, 1864, referring to certain promissory notes being the Clergy Reserve Fund, that were directed to be placed in the hands of the reeve for safe keeping, was mentioned the note of Hiram Moore, for the sum of \$278, due 1st of January, 1864, shewing that at that time the corporation were aware of the note of Moore for \$278 having been received instead of the

prior one in issue in this cause. In fact, this resolution was passed after the settlement with Shepherd's sureties and his estate : that settlement appeared to have been made on the 13th of June. The surety said he went into the accounts with the persons appointed by the corporation: the corporation charged him \$348 40, amongst other amounts of Clergy Reserve moneys. He paid all the amounts in notes except \$70, for which he gave his own note with the \$278 (note) to make up the \$348 40 note. He paid his own note by giving a receipt for school moneys for that amount, he being school treasurer. He also paid a balance of \$183, found to be due from Shepherd's estate to the corporation. The persons appointed by the corporation gave him receipts on the settlement. He subsequently offered to take the note and give cash for it, but the corporation refused.

The reeve of the township said the note, dated 10th of April, 1863, was given to him by Henry & Fairbairn (persons appointed by the municipality to settle with Shepherd's estate): it was considered as accepted by the corporation as payment of the note sued on, supposing it was negotiable.

In charging the jury, the learned judge said that the corporation had no remedy on the note for \$278, in the name of the representatives of Shepherd, because the parties were not the same; but he left it as a question of fact to the jury whether the note had not been given and received as a payment of the other note.

The jury found in favour of the plaintiffs.

In the following county court term, *R. G. Dalton* obtained a rule *nisi* to shew cause why the verdict obtained in this cause should not be set aside, or be reduced; or why a verdict should not be entered for the defendants upon the fourth plea of the defendants, pursuant to the leave reserved at the trial, on the ground that the said promissory note was void in whole or in part for usury; or why a new trial should not be had between the parties for misdirection in this, that the learned judge directed the jury upon the second issue that the promissory note mentioned in the evidence for \$278, was not available in the hands of the plain-

tiffs, and was not a payment, to the extent of the amount of that note, of the plaintiff's claim, because the plaintiff had not a remedy upon it in the name of the personal representative of Shepherd, the payee thereof, deceased; whereas, the learned judge should have directed the jury that the said promissory note was available in the hands of the plaintiff, and was, under the evidence, a payment to the plaintiffs to the extent of the amount thereof; and that the plaintiffs had a remedy upon the said note in the name of the personal representative of said Shepherd, the payee thereof, deceased, and because the verdict on the second issue was against law and evidence.

This rule was subsequently discharged.

On the demurrer to the fourth plea, judgment was also given in favour of the plaintiffs.

These judgments form the subject of the present appeal.

R. G. Dalton, with him R. Moore, for the appellants, cited *Cannan v. Wood*, 2 M. & W. 465; *Smart v. Nokes*, 6 M. & G. 911; *James v. Williams*, 13 M. & W. 828; *Cole v. Sackett*, 1 Hill (U. S.), 516; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Kendall*, 6 T. R. 123; *Edinburgh Ass. Co. v. Graham*, 19 U. C. R. 581; *Bradley v. Clark*, 5 T. R. 201, 202, per Buller, J.; *Abley v. Dale*, 11 C. B. 378; *Rex v. Box*, 6 Taun. 325; Saunders on Pl. & Ev. 635, and cases there collected; 16 Vic. ch. 80; Con. Stats. C. ch. 58, secs. 3, 5, 6, 9; ch. 25, sec. 11; ch. 83, secs. 4, 9, 57, 60, 71, 72; 23 Vic. ch. 34; 27 Vic. ch. 17, sec. 4.

Robert A. Harrison, contra, cited *The Corp. Township of Westminster v. Fox*, 19 U. C. R. 203; *Manning v. Ashall*, 23 U. C. R. 302; *Gardiner v. Ford*, 13 C. P. 446; *Bottomley v. Nuthall*, 5 C. B. N. S. 122; *Brown v. Jones*, 17 U. C. R. 50; *Lavery v. Turley*, 6 H. & N. 239; *Norbury v. Kitchin*, 7 L. T. N. S. 685; 57 Geo. III. ch. 9, sec. 6; 16 Vic. ch. 80, secs. 1, 2, 3, 4; 22 Vic. ch. 85, secs. 1, 2, 3, 6; Con. Stats. C. ch. 58; U. C. ch. 43, sec. 4.

RICHARDS, C. J., delivered the judgment of the court.

We are of opinion that, taking the whole transaction together, there was such a ratification of the acts of Shepherd

by the corporation in the subsequent adjusting of the accounts of Shepherd with his surety and the receiving of this note, with other notes and money, in full satisfaction of the claims on this note amongst other things, that it was evidence to go to the jury of payment of the former note under the plea of payment.

The observations of the learned judge, that the corporation had no remedy for the recovery of the \$278 note in the name of the representatives of Shepherd, may, we think, have influenced the jury in deciding whether the taking of the last note and the adjustment of the matter was in payment of the note sued on, and in that way, if erroneous, becomes important.

We think the views thus expressed by the learned judge erroneous, and that there must, therefore, be a new trial, without costs.

As to the question whether the contract is void on account of usury, we are of opinion that the legislature, in the different enactments on the subject, did not intend to restrict corporations not incorporated for the business of lending money, but only allowed by law to lend money, which they might have to invest, from charging more than six or seven per cent. for money. In fact, as to these latter corporations, we are of opinion that the legislature did not intend to impose any greater restrictions on them than on any other persons. The reasons which would make it necessary to limit the amount of interest to be charged by corporations which were engaged in the business of lending money, do not in our judgment, apply to municipal corporations; and on that point, though the language of the legislature is somewhat confused, we think the decision of the learned judge of the county court is correct.

The appeal is allowed, and the rule for a new trial in the county court is directed to be made absolute, without costs.

BETTES V. FAREWELL.

Computation of interest when payments made generally.

Held, that the proper mode of computing interest, in the absence of payments made specially on account of principal, is to compute it on the amount due to the time of each payment, making rests, deducting the payments, and charging interest on the balance.

This was an action brought to recover the amount of two promissory notes and interest, made by the Oshawa Manufacturing Company, and endorsed by the defendant.

The company, having become embarrassed, made an assignment for the benefit of their creditors. The plaintiff became a party to the assignment upon defendant's agreeing that if he did so, that any claim he might have against the defendant as endorser on the company's paper should not be in any manner prejudiced. The assignee from time to time made payments to the plaintiff, which covered the amount of the notes, but not the interest. The only point raised at the trial (which took place before the county judge of the county of Lincoln) that it became necessary to consider, was the mode of computing the interest. The plaintiff computed the interest on the amount due on each note to the time of each payment, making rests, deducting the payments, and carrying down the balance and charging interest thereon. By this mode the plaintiff made the amount due him on both notes \$683 36. The defendant contended, on the contrary, that the proper mode was to compute the interest on the amount of each note from the time it became due to the day of the trial, and then to compute the interest on each payment from the time it was made to the day of trial; then add the payments and interest on each together, and deduct the total from the amount of the notes and interest. The balance in this way, which would be due the plaintiff, amounted to about \$550.

It was consented that the verdict should be taken for the amount claimed by plaintiff's mode of computation, viz., \$683 35, subject to be reduced by the court to such sum as might properly be found due according to the statement, and the one made by one Whitney, a witness on behalf of defendant, or might, in truth, be really due according to the rights of parties.

In Michaelmas Term last, *C. S. Patterson* moved, pursuant to leave reserved, to reduce the amount of the verdict to such sum as the court should direct.

The rule was enlarged on account of some difficulty in procuring the papers, until Easter Term last, when *Eccles* shewed cause. —The only question at the trial was as to whether the plaintiff's or the defendant's mode of computing the interest was correct; and there is no doubt, according to the authorities, the mode adopted by plaintiff is the correct one, and the verdict ought to stand.

C. S. Patterson, contra, contended that the proper mode of making up the interest was to compute it on whatever of the principal remained due, allowing interest on that, and deducting each payment from principal, and this mode would make the sum due the plaintiff \$548 32, being interest on principal alone. This was the proper mode of making the computation; for the payments, according to the evidence, were made on account of principal, and if so made, the interest could not properly be included.

Eccles in reply.—All that was meant by the statement of the witness was, that the dividends or payments made by the estate of the company were based on the principal sum, and were only sufficient to pay that sum, and not the interest: and if there is any doubt about the matter, the learned judge of the county court ought to be referred to, or a new trial had to find the facts as to the payments.

RICHARDS, C. J., delivered the judgment of the court.

McGregor v. Gaulin, executors of Chisholm (4 U. C. 379), is an authority that the mode adopted by plaintiff is correct, of applying payments and making rests in the absence of payments being specially made on account of the principal. It seems equally an authority in favour of the view now pressed by Mr. Patterson (which does not seem to have been taken at the trial), if the payments were expressly made on account of principal. That part of the evidence of Whitney, as noted by the learned judge of the county court, applicable to the point, was as follows: "Bettes was a party to the assignment. Some assets are still in my hands, as agent of the assignees. The dividends, as charged in the state-

ment, have been paid to the plaintiff. The payments made to the plaintiff were paid on the principal. The statement I put in is correct, and there is only \$394 40 due plaintiff." (*Note*.—This is an error, for that is about the balance due on one note: that due on the other, according to defendant's statement put in, was \$151 61=\$556 04.)

By consent the verdict is entered: "It is consented that a verdict be taken (if plaintiff entitled to recover) for the sum claimed in (plaintiff's) Mr. Eccles' statement, viz., \$683 36, subject to be reduced by the court to such sum as may properly be found due according to the statement and the one sworn to by Whitney, or may be really due according to the rights of parties."

There were other questions left to the jury, on which they found for the plaintiff.

Both statements of the calculations of interest were put in. That adopted by the plaintiff is the correct one, unless the question can be considered as raised, whether the payments were expressly made on account of principal. The proper mode of raising that point would have been before the judge at the trial, and the question of fact could then have been submitted to the jury. But the only question that seemed to be raised was the mode of computing the interest; that contended for by plaintiff or that by defendant; and as to that, as already observed, we are of opinion that plaintiff was right.

The learned county judge, on being referred to, has further certified that the question intended to be left to the court was, "the effect of the plaintiff's letter on the plea of release and the proper computation of interest with or without rests." In reference to Whitney's testimony, he says: "Using the word principal, as far as I understood the evidence of Mr. Whitney, the whole amount of the note was paid, as far as principal was concerned, from dividends arising out of the estate."

As the point now raised does not appear to have been taken at the trial, but merely the correctness of the two modes of computing the interest, without at the same time expressly raising the question of how the payments were made—whether on principal alone or generally—I do not

think the defendant can be permitted to take advantage of it now. If the question of the fact had been then raised it might have been disposed of at once by being left to the jury, and might have been decided against the defendant. We are not called upon to decide it in the way the question is referred to us ; but are only asked to say whether plaintiff's mode of computation or defendant's is the correct one, and we decide in favour of plaintiff as to that.

I do not feel that the justice of the case requires us to send down the cause again to decide the question of fact now first raised, to enable us to decide in favour of the mode of computation not suggested at the trial, but for the first time by counsel in moving this rule. The plaintiff seems to have become a party to the assignment of the Oshawa Company at defendant's request, probably, as appears from the evidence and papers filed, for his benefit, and on the express understanding that his remedy against defendant as an indorser should not in any manner be prejudiced thereby.

We are all of opinion this rule should be discharged.

Rule discharged.

THE QUEEN V. FINKLE.

Confessions—Evidence on which receivable—Inducements to confess—Jury directed to disregard confession—Duty of judge in such cases—Practice.

The prisoner was convicted of arson. His admission or confession was received in evidence on the testimony of the constable, who said that after the prisoner had been in a second time before the coroner he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement being held out to him. There was also evidence that on the third day of his incarceration he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything, unless he wished. He then made a second statement, and after an absence of a few minutes returned and made a full confession.

Held, that on these facts appearing, the statement made to the constable was *prima facie* receivable, and that the judge was well warranted in receiving as voluntary the confession made to the coroner after due warning by him.

Semble, however, that the more reasonable rule to adopt in such cases is, that notwithstanding the caution of the magistrate it is necessary in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him. But, in this case, it having afterwards appeared that the prosecutor had offered direct inducements to the prisoner to confess,

Held, that if the judge was satisfied that the promise of favour thus held out had induced the confessions and continued to act upon the prisoner's

mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them.

Held, also, that if the judge suspected the confession had been obtained by undue influence, such suspicion should have been removed before he received the evidence.

It is a question for the judge whether or not the prisoner has been induced by undue influence to confess.

Semble, 1. That when the names of other prisoners are mentioned in the confession, the proper course is to read the names in full, but to direct the jury not to pay any attention to them.

2. That the withholding from the court the confessions made before the coroner will render the application for a new trial irregular.

It is not desirable to grant rules *nisi* for new trials in criminal cases where there is no probability of there being made absolute, inasmuch as it is calculated to excite expectations not likely to be realized, and to raise doubts as to the promptness and certainty of punishment.

The prisoner was convicted of arson at the last spring assizes holden at Goderich.

D. G. Miller now moved for a rule *nisi* for a new trial on the grounds stated in the judgment of the court, which was delivered by

RICHARDS, C. J.—The first ground on which the new trial is moved for is, that the verdict is contrary to law and evidence in this, that, without reference to the alleged confession of the prisoner, there was no evidence against him.

We think there was evidence which, independently of the confession, would warrant the jury in convicting the prisoner. The fact that he was up and down during the night; went out and in from the house where he resided, which was near the premises destroyed by fire; that he went out of the house between three and four o'clock; went out by the back door, and called the dog; that tracks in the snow, resembling those made by the boots he wore, as also the tracks of the dog, were traced near to the house destroyed, and to the back part of it; that a basket, or two baskets, that were in the house, were also found in a lot not far distant, at a place to which the same tracks led; that the dog was burned in the house, from which his cries were heard; prisoner's repeated denials and admissions, first, as to the tracks, denying they were his, and then admitting they were; then that there was no dog with him; then that the dog was with him; then that he went to bed at one o'clock, and had not been up; then that he had been up

and down doing the night ; that he first saw the fire when he was in bed through the window, when the fire could not be seen from that place ; the fact that the fire occurred about daylight, and prisoner left Mrs. Finkle's house, where he was staying, between three and four o'clock in the morning ; the fact that prosecutor's wife, who was there and heard him go out, did not know at what hour he returned, but just before the alarm of the fire he had been making a great noise—was sobbing and crying ; that he jumped up, said he smelled fire, and cried “ fire ” before any was visible, and had his clothing on ; that the baskets that were found were in an outbuilding—the back kitchen—of the premises destroyed, and the footmarks led to the place where they were put, and they were found with snow over them that had just fallen, the marks being identified as by his admission, and by their resembling those made by the boots he had on ; that the track was peculiar, a nail being out of the toe of the boots ; and the further fact that he and the prosecutor were not on good terms ;—these facts would seem to warrant the conclusion that prisoner set the premises on fire ; at all events they were evidence to go to the jury, and their finding could not, I think, be set aside as against evidence, or even the weight of evidence.

The second ground is, that the judge improperly allowed the admission, or pretended confession, of the prisoner to be read, without proper evidence of the manner in which the same was obtained, or that it was the voluntary confession of the prisoner, and the confession was improperly read in evidence. The general doctrine is, that the judge is the proper person to decide, if the case for the admission of the evidence is properly made out on behalf of the crown.

In *Joy on Confession*, at page 59, it is laid down that “ a confession is admissible in evidence made to one in authority, although the prisoner was, immediately before such confession, in the custody of another person not produced ; and although it is not shown that such person did not hold out a threat or inducement. The rule had been thus stated : ‘ For the purpose of introducing a confession in evidence, it is unnecessary in general to do more than negative any promise or inducement held out by the per-

son to whom the confession was made.' In Clews' case (4 C. & P. 221) it appears that the prisoner had an interview with a magistrate, and subsequently with the coroner. The coroner's clerk was produced, and proved that the prisoner was duly cautioned by the coroner. It was objected by counsel, that the magistrate might at the previous interview, have told the prisoner it was better for him to confess and that, therefore, the magistrate ought to be called on the part of the prosecution. Littledale, J., said it would be fair in the prosecution to call him ; but that he would not compel them to do so. He was called by the prisoner, and the confession was then admitted." Gibney's case (Jebb. page 15) is also referred to as authority for receiving the prisoner's confession, when he had shortly before had conversations with a constable and others, though such persons were not called. It is added: "If, however, there be any probable ground to suspect collusion in obtaining the confession, such suspicion, it is said, ought in the first instance to be removed : " Phillips, 430.

The evidence of the prisoner's confession at the trial was first that of Jackson, the constable, who stated that after prisoner had been in a second time before the coroner, he stated there was something more he could tell. The constable asked what it was, but not to say what was not true. He said he went over to the house, got in at the window, and set the place on fire. Mrs. Finkle had told him to go over and get a note or paper, and if he could not find it he was to set the house on fire. The constable did not recollect any inducement being held out. The constable asked him if he wanted to go in and state that before the jury. He said he did. It further appeared that on the third day after he had been taken into custody, he told the coroner he wished to confess. The coroner said to him that anything he said might be used against him, not to say anything unless he wished: just the ordinary caution. He then made a second statement. He had only been absent a few minutes when he returned and made the last written confession, after the constable had informed the coroner of prisoner's desire.

When the prosecutor was examined he had stated, on cross-examination, that he had got the key of the lock-up, and conversed with prisoner, and had asked Mr. Whitehead to go and get Mr. Kelly and Mr. Campbell to hear prisoner's confession; and the constable said Perrin had got the key of the lock-up from him, to see the prisoner. He told the constable that the warden (Mr. Whitehead) and some one else wanted to see prisoner, or he would not have given the key to Perrin. Two or three were in the room: Roger Lee was one. Perrin took an active part in the examination. The statements made before the coroner were given in evidence against the prisoner. It appeared, however, from the evidence called afterwards by the prisoner, that Perrin, the prosecutor, had offered direct inducements to prisoner to confess, promising to get up a petition in his favour, &c. When this appeared, the learned judge directed the jury to exclude from their consideration the confession and all that Jackson had said of it, and directed them to acquit the prisoner, unless the other evidence satisfied them beyond reasonable doubt that the prisoner was guilty.

In Taylor on Evidence, at page 702 (second edition), it is thus stated: "Indeed it may be generally laid down that though an inducement has been held out by an officer or prosecutor, or the like, and though a confession has been made in consequence of such inducement, still if the prisoner be subsequently warned by a person in equal or superior authority that what he may say will be evidence against himself, or that a confession will be of no benefit to him; or if he be simply cautioned by the magistrate not to say anything against himself, any admission of guilt afterwards made will be received as a voluntary confession. More doubt may be entertained as to the law if the promise has proceeded from a person of superior authority, as a magistrate, and the confession is afterwards made to the inferior officer; because a caution from the latter person might be insufficient to efface the expectation of mercy, which had been previously raised in the prisoner's mind."

The statement made to the constable, Jackson, *prima facie* was receivable, and that made to the coroner, after

the warning given by the coroner, the learned judge would be well warranted in considering as a confession voluntarily made. Some of the authorities go the length of holding that the evidence was not only properly received, but that it was good evidence to go to the jury and to be taken into consideration by them, inasmuch as the prisoner was warned by the coroner, who was the person possessing higher authority than the prosecutor, on account of whose promises the prisoner was supposed to have been induced to make the statement.

I think, however, the more reasonable rule to act on is, that notwithstanding the caution of the magistrate, it is necessary to go further in the case of a second confession, and to inform the party that the first statement cannot be used to his prejudice; not merely to caution him not to say anything to injure himself: *Rex. v. Smith* (2 Russ. C. & M. 833); *Rex. v. Campion* (Ib. 384); *Rex. v. Sherrington* (2 Lew. C. C. 123). If, after the prisoner has been cautioned and his mind impressed with the idea that his prior statement cannot be used against him, he still thinks fit to confess again, the latter declaration is receivable: *Rex. v. Richards* (5 C. & P. 318); *Rex. v. Griffiths* (2 Russ. C. & M. 832); *Rex. v. Sexton* (Ib. 833); and as to continuing influence, see *Regina v. Hewitt* (1 C. & M. 291). This last case seems to be an authority, that if the confession is made after warning, when the person to whom it is made is not aware of any promises of favour by another person, the confession may be received; for the accused might imagine that having once confessed it would be of no use to deny what he had once said, and no distance of time will cure the defect of want of previous caution: *Regina v. Collier* (3 Cox. 57); *Rex. v. Meynell* (2 Lew. C. C. 122); Wool. C. L. 196.

If the learned judge was satisfied that the promise of favor made by the prosecutor to the prisoner influenced him to make the confession, which was given in evidence, and continued to act upon his mind notwithstanding the warning of the coroner, then he was right in telling the jury to reject the confessions. If, in the course of the examination of the witnesses for the prosecution, the judge had suspected the confessions had been obtained by undue influence, that sus-

picion ought to have been removed before the evidence was received. It is a question for the judge whether the prisoner was induced to make the confession by undue influence or not : *Garner's Case* (1 Den. C. C. R. 329) ; and that case is also authority to show that the correct course to be taken by the judge, when evidence has been received which is afterwards shewn not to be properly receivable, is to treat it as if it had been inadmissible in the first instance ; and the effectual way of doing so is, to tell the jury not to consider the confessions, and to dispose of the case on the other evidence, which was the course pursued by the judge on this trial.

Many of the cases show that the objectionable evidence is taken down before it is discovered that it is not admissible, and it is afterwards rejected ; and if no other sufficient evidence to sustain the case is offered, the jury are directed to acquit for want of evidence : *Regina v. Warringham* in note to *The Queen v. Baldry* (2 Den. C. C. p. 447).

A similar principle is acted on when the names of other prisoners are mentioned in the confession. It has been suggested that the names ought not to be mentioned in reading the confession ; but the proper course seems to be to read the names in full, the judge directing the jury not to pay any attention to them : *Rex v. Jones* (4 C. & P. 217) ; *Rex v. Maudesley* (2 Lew. C. C. 73) ; *Roscoe's Crim. Law*. 4 ed. 53, and cases there collected.

The inclination of the courts is not to extend the rule for excluding confessions : they think the cases have gone far enough. In *Regina v. Baldry* (2 D. C. C. 430) many of the cases are considered, and some of the former decisions on this point over-ruled. *The Queen v. Moore*, in the same volume p. 525, is on the same question.

The third ground mentioned in the motion paper is, that the confessions or admissions, if any were in fact made, are directly in favour of the presumption of the prisoner's innocence. Only the admission made to Jackson is before us. Those before the coroner were not placed before us by the prisoner's counsel in moving this rule. As I understood him, he purposely abstained from producing them for fear

they would create an unfavourable impression on our minds *against* the prisoner. I am inclined to think that the application for the rule *nisi* is irregular for want of these confessions, if anything turned upon them; but my brother John Wilson, who tried the cause, is quite satisfied there was nothing in the confessions that was favourable to the prisoner, or on which, in that view, we would grant a rule *nisi*. The prisoner's counsel in moving did not refer us to anything that the confessions contained that was favourable to him, and as they were finally rejected as evidence, we do not insist on their being brought before us in disposing of this application, particularly as the prisoner's counsel does not contend that their rejection as evidence was prejudicial to his client.

The judges of both courts, I believe, are all of opinion that it is not desirable to grant rules *nisi* for new trials in criminal cases, when there is no probability of their being made absolute: it is calculated to excite expectations in the minds of prisoners that are not likely to be realized, and would be injurious to the administration of justice by exciting hopes and raising doubts as to the promptness and certainty of punishment when no such feelings ought to exist.

The rule will not be granted.

I have looked at the following cases and references:—*Reg. v. Fletcher* (2 Lew. C. C. 68, 72; S. C. (4 C. & P. 260); *Rex. v. Walkley et. al.* (6 C. & P. 175); *Reg. v. Arnold* (8 C. P. 621); *Reg. v. Hewell* (Car. & Mar. 534); *Reg. v. Dingley* (1 C. & K. 637); *Rex. v. Cooper* (5 C. & P. 535); *Rex. v. Bryan* (Jebb. C. C. 157); *Reg. v. Cheverton* (2 F. & F. 833); Joy on Confessions, 69, 72 & 74.

Rule refused.

THE QUEEN V. HATCH ET AL.

Appeal from quarter sessions—Noncompliance with Con. Stats. U. C., ch. 113, sec. 9, and rules of court.

The court will not hear an appeal from the Quarter Sessions unless the provisions of the statute and rules of court prescribing the preliminary steps necessary to the hearing of such appeal have been strictly complied with.

On coming to this case which had been entered on the paper, the court declined to proceed with it for the following reasons, as contained in the judgment of the court which was now delivered by

RICHARDS, C. J.—In the first place, Con. Stat. U. C., ch. 113, sec. 9, requires that when the appeal is from the Quarter Sessions, the case shall be transmitted to the Superior Court on or before the first day of the term of the Superior Court *next after* the time when the rule or order appealed from was made.

The judgment of the learned judge, as reported to us, is dated 28th January, 1865, and the entry of the discharge of the rule *nisi* is entitled in January term, 1865. The sitting of this court, next after the rule was made or judgment given, was in Hilary Term last, which began on the 6th of February, 1865.

Second—By rule of court, Hilary Term, 21 Vic., dated 13th of February, 1858, it is provided that, on appeal from the Quarter Sessions, notice shall be given by the person convicted, or his attorney, to the county attorney, within six days from the time of sentence passed, * * * and an affidavit of service of such notice shall be filed in the Superior Court appealed to with the papers directed to be transmitted by the statute.

No notice was transmitted with the papers.

Third—The third rule of court says that every case sent from the Quarter Sessions shall state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted is in prison, or has been discharged on bail to appear and receive judgment.

The papers sent to us shew that on the motion for a new trial the defendants were to appear on the 27th December, and were bailed to appear for sentence. It is not shewn if

they appeared for sentence, or if they have been sentenced, or are in prison, or have been discharged on bail to appear and receive judgment.

Fourth—By the fourth rule of court the original case, copies, &c., are to be delivered to the clerk of the court appealed to at least *four days before the sitting of the court*.

These papers were not delivered to the clerk of this court until after the first day of the sitting of the court. We, therefore, decline to hear the appeal.

THOMAS v. GRACE.

Written agreement by parties severally promising to pay certain sums, a several promissory note.

Defendant, with others, signed the following instrument, his subscription being \$100 :

"We, the undersigned, do hereby severally promise and agree to pay to F. W. Thomas, Esquire (the plaintiff), agent of the Bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal Church and Rectory in the town of Goderich."

The declaration thereon alleged that in consideration that W. and others would promise defendant to pay the plaintiff certain specified sums, for the purpose, &c., and that plaintiff would pay \$100 for the same purpose, defendant promised to pay the plaintiff \$100 therefor; that W. and the others did promise and pay accordingly, and the plaintiff paid \$100, yet defendant had not paid.

At the trial the plaintiff's promise to contribute \$100 was not proved.

Held, that on this ground defendant was entitled to succeed, and the judgment of the court below refusing a nonsuit was reversed; but

Held, also, that the instrument declared on was the several promissary note of each subscriber; and as it seemed that the plaintiff was entitled to recover, though not upon these pleadings and evidence, a new trial was ordered on payment of costs.

This was an appeal from the County Court of the United Counties of Huron and Bruce.

The declaration may be briefly stated to have been to the following effect: In consideration that James Watson and others would severally subscribe and promise defendant to pay plaintiff certain sums of money, namely, Watson \$100, and some others certain other sums, for the purpose of building an Episcopal Church and Rectory in Goderich, and that plaintiff would pay and expend \$100 for the same purpose, the defendant promised to pay to the plaintiff \$100 for that purpose; and plaintiff averred that Watson and certain other persons respectively *promised the defendant*

to pay the plaintiff, and did pay plaintiff, Watson, the said sum of \$100, and the others certain other sums for the purpose aforesaid, which moneys were expended and applied in and towards such purpose, and plaintiff did also pay and expend for the same purpose the sum of \$100, and all conditions were fulfilled and all things happened necessary to entitle plaintiff to receive and defendant to pay the said sum of \$100, yet defendant did not pay the sum.

The defendant pleaded that he did not promise as alleged.

2. He made the promise to pay \$100 on condition of the plaintiff or others building an Episcopal Church and Rectory in Goderich, and that neither plaintiff, nor any one else, afterwards built the said Episcopal Church and Rectory, commenced to build the said church, or applied any money therefor or towards such purpose, or incurred any liability, or entered into any contract therefore, though a reasonable time had elapsed.

3. That he made the promise in the declaration mentioned for the purpose of building an Episcopal Church and Rectory in Goderich, and not for the building of a rectory alone, and made the promise on condition that the money should be so applied, and for that purpose signed, together with the said Watson and others, a subscription list in the words following :

“ We, the undersigned, do hereby severally promise and agree to pay to F. W. Thomas, Esquire, agent of the Bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal Church and Rectory in the town of Goderich.”

That after said promises, and before the commencement of this suit, the plaintiff and others associated with him in the proposed building of the church and rectory, without the knowledge or consent of defendant and without any power so to do, agreed amongst themselves to apply and did apply and expend the first £600 on the subscription list promised by defendant and others, including the \$100 in the declaration promised by defendant, towards building a rectory only, and the moneys as subscribed had all been applied to the construction of the rectory, contrary to the true stipulation and condition on which defendant promised to pay, &c. the

\$100, and that neither plaintiff nor any one after the promise at any time built the said church or commenced to build it, or paid out any money therefor, or incurred any liability or entered into any contract therefor, though a reasonable time has elapsed.

The objection taken to the plaintiff's right to recover in the court below were :

1st. That the promise set out in the declaration was *nudum pactum*.

2nd. That the consideration and contract set out in the declaration were not sustained by the evidence : the allegation in the declaration being that in consideration that Watson and others would severally subscribe and promise the defendant to pay the plaintiff \$100 for the purpose of building an Episcopal Church and Rectory, the defendant promised the plaintiff to pay him \$100 for that purpose ; whereas in fact the promise, if any proved by the plaintiff, was a separate and distinct promise by each of the persons named in the deed to the plaintiff to pay him the sum of \$100 each, and not a promise by each of them to the defendant to pay the plaintiff as alleged.

3rd. That there was no evidence that the plaintiff incurred any loss or damage, or subjected himself to any charge or obligation at the instance of defendant with respect to the subject matter of the suit.

4th. That the contract produced at the trial did not sustain the declaration, and no other evidence was or could be given to sustain said declaration ; that the oral evidence given by plaintiff clearly established no such consideration for defendant's alleged promise as that set out in the declaration.

5th. The plaintiff's evidence proved that the building of a church and rectory was the consideration for which the defendant and the others named to the declaration promised to pay the amount set opposite their names ; and in fact no church was ever commenced, and the building of the church was a condition precedent to plaintiff's being called on to pay the sum.

The motion in term in the court below was to enter a nonsuit on the grounds taken at the trial, and for a new trial on the further grounds,

6th. That the verdict was contrary to law and evidence.

7th. That the learned judge at the trial misdirected the jury, in telling them that if defendant's conduct was such as to lead them to believe that defendant sanctioned the building of the rectory first, they should find for plaintiff; whereas in fact it was no part of the issue nor in any way in question in the cause which of the buildings should be erected first.

8th. For further misdirection, in telling the jury that if defendant's conduct was not such as to put the plaintiff on his guard, that if both buildings were not completed he would not pay, to find for plaintiff.

9th. That the learned judge ought to have told the jury that if the defendant subscribed for building a church and rectory, and if the church was neither built nor commenced, nor any liability incurred on account of it, to find the issue on the second plea in favour of the defendant.

10th. That the learned judge should have told the jury that if defendant subscribed for the purpose of building a church and rectory, and if the plaintiff and others, without defendant's sanction, agreed to apply the first £600 of the amount subscribed towards building a rectory, if the church was neither built nor commenced, nor any liability incurred on account of it, then to find on the third plea for defendant.

In Michaelmas Term last *S. Richards, Q. C.*, supported the appeal.—There is nothing shewn in the declaration as moving from the plaintiff: the only promise is to the co-signers of the document. Suppose one of them suing, how would the promise then be alleged? The plaintiff substantially alleges that defendant's liability arose when the contract was made. The allegation that the other subscribers paid their money, and that it was expended for the purpose contemplated, is of no consequence. As far as the declaration shews, the promise by defendant is *nudum pactum*, *Baker et al. v. Vanluven*, 14 U. C. C. P. 214. There the effect of the agreement was, if plaintiffs would build a church of a certain size, defendant would pay a certain sum of money therefor. If there had been any consideration moving from plaintiff to defendant for the promise, or if the instrument declared upon had been addressed to plain-

tiff, and had been to the effect that if he would build a church and parsonage, or, perhaps, even if he would expend the money subscribed for that purpose defendant promised to pay him \$100, that might be sufficient, but in its present form it seems mere *nudum pactum*. He cited *Boydell v. Drummond*, 11 East. 142; *Parsons on Contracts*, 377; *Holmes v. Dana*, 12 Mass. 190; *Limerick Academy v. Davis*, 11 Mass. 114-117; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Foxcroft Academy v. FAVOR*, 4 Maine Rep. 382; *Warren v. Stearns*, 19 Pick. 73, cited in *Parsons on Contracts*, *supra*; *Stewart v. Hamilton College*, 2 Denio, 403.

C. Robinson, Q. C., *contra*.—The pleas by defendant are no answer to the action. The subscription is not to build a church and parsonage, because that would be absurd, as the subscriptions were the very means by which, from time to time, the moneys to pay for the building of the church and parsonage were to be raised. The subscription is *for the purpose* of building a church, &c. The pleas do not deny the promises of others to pay in consideration that defendant promised to pay.

At this stage of argument it was suggested that an amendment had been made in the declaration, which by some oversight had not been properly transcribed in the copy forwarded by the learned judge of the county court. The further argument of the case was therefore postponed until Hilary Term last, when it appeared that the allegation, "and that plaintiff would pay and expend for the same purpose one hundred dollars," had been introduced into the declaration before the trial, as well as the further allegation, "and that the plaintiff did also pay and expend for the same purpose the sum of one hundred dollars." These amendments having been introduced into the case, the argument then proceeded.

Richards, Q. C.—It is necessary to prove that the whole of the consideration named was given or paid. There ~~is~~ nothing in the evidence from which it can be inferred that any such agreement as is now set up on the part of the plaintiff was made. He may have expended the one hundred dollars voluntarily and without reference to defendant's subscription, and there is nothing to shew that he ever did

make an agreement that he would pay and expend one hundred dollars for the purpose of building a church, &c.

Robinson, Q. C., resumed his argument.—There appears sufficient consideration for the defendant's promise; first, the agreement by the other subscribers to subscribe and pay in the event of his subscribing; and, secondly, plaintiff's own agreement to pay, and the expenditure of the sum: *Chitty on Contracts*, 5 ed. 28; *Steward v. The Trustees of Hamilton College*, 2 Denio. 403; *Wood v. Roberts*, 2 Starkie, 417; *Broom's Common Law*, 3rd. ed. 316; *Robertson v. Wait*, 8 Ex. 299; *Story on Contracts*, i. 555; *Parsons on Contracts*, i. 377; *Trustees of Bridgewater Academy v. Gilbert*, 2 Pick. 580; *Smith on Contracts*, p. 107, Am. ed. notes. But this instrument is, in fact, a promissory note, and it has a sufficient legal consideration, first, the agreement between the subscribers, that each would give his note, or sign the note, payable to plaintiff, in consideration that the others would do so, and the others having done as well as the defendant there is in that way consideration for the note; and, secondly, the purpose expressed in the agreement or note itself shews a good moral consideration sufficient to support the legal promise: *Hammond v. Small*, 16 U. C. R. 371; *Patton v. Melville*, 21 U. C. R. 263; are express authorities on this latter point. *Parsons v. Jones*, 16 U. C. 274, shews that though the instrument is declared on as an agreement, yet if it be a note, as this is, that is sufficient.

Richards, Q.C., contra.—As the instrument is set out in the declaration it would be difficult to make a promissory note of it. This point was not in any way raised in the court below, and the points taken as grounds for nonsuit will apply to the instrument either as an assignment or a promissory note.

RICHARDS, C. J., delivered the judgment of the court.

As to consideration for defendant's promise, and the agreement entered into by him, they may be considered substantially stated in the declaration with more which may probably be rejected as surplusage; viz., in consideration that Watson and others would subscribe and promise to pay

plaintiff certain sums of money (Watson \$100) for the purpose of building a church and rectory in Goderich, defendant promised to pay plaintiff \$100 for that purpose, and plaintiff avers that Watson and others did promise to pay plaintiff, and did pay plaintiff (Watson) the \$100, and others certain sums of money for that purpose, and which monies were expended for that purpose, yet defendant had not paid the \$100. This shews a consideration moving from Watson and others for defendant's promise, and defendant's failure to perform his promise. It may be urged that there appears from that a sufficient consideration, but there is no privity between plaintiff and defendant, for this consideration does not move from him but from others, and therefore plaintiff cannot sue on the promise.

The consideration for the agreement is not to build a church and rectory ; but if certain persons would promise plaintiff to pay certain sums of money for that purpose, he, defendant, would also promise to pay plaintiff \$100 for the same purpose : the consideration in this form is quite apart from the building of the church or rectory. Plaintiff, of course, could be called upon to shew a proper expenditure of the money that he had received for a certain purpose ; but it is no answer, if he has a right to receive the money, to say that he has not begun to expend it for the purpose for which it was paid to him. Besides we must import into agreements like this that which was present to the minds of all at the time it was entered into. It was not contemplated nor made a condition precedent that the church and rectory should be built before the money subscribed was paid. The very money subscribed was undoubtedly to be employed for paying for the building, and would be required for that purpose, and, in the usual course of things, from time to time to pay for the building as it progressed.

As to the evidence necessary to sustain the contract or agreement in the form suggested, the instrument itself is as follows :—

“ We the undersigned do hereby severally promise and agree to pay to F. W. Thomas, Esquire, agent of the Bank of Montreal in Goderich, the sum set opposite our respective

names, for the purpose of building an Episcopal Church and Rectory in the Town of Goderich."

It is not suggested that any one of the subscribers intended to put down a sum sufficient to build the Church and Rectory himself: each one no doubt contemplated that there should be others who would subscribe as well as himself, and that each subscriber would pay what he put down, and that each put down his name with that understanding. Undoubtedly no subscriber would have put down his name, say for \$100, if it had been stated to him at the time that there would be no one else who would subscribe, though it would require many thousands of dollars to build the church and rectory. The very nature of the transaction and the signing of the instrument afford evidence that the consideration for each signing was that the others would sign and pay. The parol evidence shews that the defendant and some other signers were present when the meeting was held at which it was proposed to have the church and rectory built, and when the subscriptions were spoken of. His name appears to be the second on the list of subscribers: there is but one before his: there are several after it. There is ample consideration for the agreement or promise, and the proper construction of the instrument itself is all in the plaintiff's favour; but it does not shew a consideration moving from the plaintiff so as to enable him to sue and recover on it in the present form of declaration and under the evidence given.

That part of the consideration for defendant's promise set out in the declaration, which appears most material to sustain the plaintiff's case in its present form, viz., his, the plaintiff's, promise to expend and contribute \$100 towards the building of the church and parsonage, was not proved at the trial. This point seems raised by the fourth ground of nonsuit taken at the trial, viz., "That the contract produced did not sustain the declaration, and no evidence was or could be given to sustain the declaration; the oral evidence clearly established no such consideration for defendant's alleged promise as that set out in the declaration." On this ground we think the defendant was entitled to have the ruling of the learned judge in his favour in the court below.

The facts proven at the trial would seem, under the authorities referred to by Mr. Robinson, to shew ample consideration to sustain the instrument given in evidence as the several promissory note of each of the subscribers. Unfortunately it is not set out in the declaration, so that we can uphold the decision of the court below on that ground, though such ground was not taken there. In *Parsons v. Jones*, referred to by Mr. Robinson, it clearly appeared that the instrument put forward was in writing, and contained a promise to pay.

We regret that the litigation which has taken place has failed to establish the plaintiff's right to recover in this action where the facts shewn, under the decided cases, would seem clearly to indicate that the defendant was liable to pay the plaintiff the sum sought to be recovered in the suit.

The appeal must be allowed without costs. We think we may direct that the judgment in the court below be reversed, and the rule for a new trial be made absolute in the court below on payment of costs.

Appeal allowed, and rule absolute for new trial in court below on payment of costs.

McNEIL V. KELEHER.

Sale in bulk—Delivery of part passes property in the whole.

Plaintiff sold to defendant a certain quantity of wood, cut and lying on his premises, supposed to be about one hundred cords, agreeing to remove it from his (the plaintiff's) land to the bank of a canal adjacent thereto, and there deliver it from time to time for defendant. Forty-one cords were accordingly so delivered, and taken away by defendant and subsequently twenty-five cords more were delivered at the same place. After the delivery of the latter the price of wood rose, whereupon plaintiff forbid defendant removing the twenty-five cords, which, however, defendant did. The plaintiff having brought replevin and failed in his action, *Held*, affirming the judgment of the County Court discharging rule for a new trial, that the jury having found the above facts, it was not necessary for defendant to measure the wood so delivered in order to acquire property therein; that the mere delivery of the twenty-five cords by plaintiff, in part performance of his contract, passed the property therein to defendant, which could not be divested by any subsequent act of plaintiff.

Semble, that any lien for the price which the plaintiff might before have had upon the wood was lost by its removal to land neither his own, nor under his control.

This was an appeal from the County Court of the United Counties of Frontenac, and Lennox and Addington.

The action was replevin for thirty cords of wood.

Pleas.—1st, Goods not the plaintiff's; 2nd, Leave and license.

It appeared that about the middle of June, 1864, the plaintiff agreed to sell to defendant one hundred cords of wood at eight shillings a cord, provided he could get it out of the woods and pile it on the canal. The wood was to be delivered to the defendant on the bank, and it was stipulated that if plaintiff failed to get it all out, viz., one hundred cords, defendant was to take no advantage of him. Subsequently, and in pursuance of this agreement, plaintiff delivered on the bank forty-one cords, which defendant took away, and about which there did not appear to be any difficulty or question; but afterwards plaintiff, having drawn another lot of twenty-five cords to the bank, forbid defendant's taking it away, which defendant, however, notwithstanding, did. No positive reason for this injunction not to remove this portion was clearly made out, but it was suggested that the price of wood had risen, and that therefore plaintiff desired to terminate the contract. There appeared to have been twenty-five cords on the bank, and the plaintiff replevied thirty.

At the trial, *O'Reilly*, Q.C., objected, as to the twenty-five cords delivered on the bank, that until there was a measurement no property passed, more especially as there was no time specified for payment, and no price paid. The learned judge overruled the objection, and told the jury that if they thought it was a contract for forty-one cords only, then plaintiff should have a verdict; if for one hundred cords, to be delivered on the bank, and that these twenty-five cords were part of the one hundred, then that defendant should have a verdict, as the previous delivery of forty-one cords was part delivery of the one hundred, and as soon as the twenty-five cords reached the bank, it was delivered to the defendant.

The jury found for defendant.

In the following term, *O'Reilly* obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground that the said verdict was contrary to law and evidence and the weight of evidence in this, that the evidence established that at the

time of the taking of the wood in the declaration mentioned it was the property of the plaintiff, and that no property in the wood passed from the plaintiff to the defendant; and on the ground of misdirection on the part of the learned judge who tried the cause in this, that the learned judge misdirected the jury in stating that the evidence was sufficient to establish a sale and delivery of the wood to the defendant, and that the property in the wood passed to the defendant by the agreement made and entered into between the parties, and that the plaintiff had no property in the wood at the time the action was brought; and on the ground that the learned judge should have charged the jury that the wood being in loose piles scattered over the plaintiff's farm, could not be considered the property of the defendant until it was delivered and measured.

This rule was discharged; and the present appeal is from the judgment of the learned judge in discharging the same.

J. Gwynne, Q.C., for the appeal, cited *Morton v. Tibbett*, 15 Q. B. 428, 438; *Thomson v. Maceroni*, 3 B. & C. 1; *Studdy v. Sanders*, 5 B. & C. 628; *Phillips v. Bistolli*, 2 B. & C. 511; *Thomkinson v. Staight*, 17 C. B. 697; *Boulter v. Arnott*, 1 C. & M. 333; *Elliott v. Thomas*, 3 M. & W. 170, per Cresswell, J.; *Scott v. E. C. R. Cos.*, 12 M. & W. 33; *Bigg v. Whisking*, 14 C. B. 195; *Tempest v. Fitzgerald*, 3 B. & Al. 680; *Smith v. Chance*, 2 B. & Al. 753.

Sir Henry Smith, Q. C., contra, cited, *Rugg v. Minett*, 11 Ea. 210; *Baldry v. Parker*, 2 B. & C. 37; *Rohde v. Thwaites*, 9 Dowl. & Ry. 293; *Tarling v. Baxter*, ib. 272; *Gilliatt v. Roberts*, 19 L. J. Ex. of Pleas, 410; *Chitty on Con.* 394; *Addison on Con.*, last ed., 174, 2nd Amer. ed., 41.

RICHARDS, C. J., delivered the judgment of the court.

I do not understand from the evidence that this was an absolute sale of one hundred cords of wood by the plaintiff to the defendant, which was an entire contract, and all to be delivered before plaintiff could be considered as having completed his bargain; but rather a purchase by the defendant from the plaintiff of his wood, supposed to be one hundred cords, which was then cut and lying about plaintiff's premises; that this wood was to be drawn to the bank of the

canal adjacent to plaintiff's premises, and there delivered from time to time for the defendant: that in pursuance of that agreement, forty-one cords of wood were drawn to the bank, and there delivered for the defendant, who took it away; that the twenty-five cords in dispute were in the same way taken to the bank and left there for the defendant, in pursuance of the agreement; that after these twenty-five cords were so delivered, the price of wood rose, and when the defendant came to take them away plaintiff forbid him doing so, but defendant claimed the wood as his property, as having been delivered there for him under the agreement, and took it away.

I understand the charge of the learned judge of the County Court to be to the following effect: if the contract was for forty-one cords only, then the plaintiff should have a verdict; but if for the one hundred cords, and the forty-one cords were delivered on the bank in part fulfilment of that contract, and the twenty-five cords were also delivered in like part performance of the same contract, then to find for the defendant; for the delivery of the forty-one cords being in part performance of the contract for the delivery of the one hundred cords, that took the contract out of the Statute of Frauds; and the delivery to the defendant under the contract at the place agreed upon, passed the property to him in the twenty-five cords there delivered from him; and after they were so delivered, plaintiff had no right to revoke the appropriation of them thus made to the defendant.

I think the ruling of the learned judge may well be supported, on the ground that, under the evidence, and charge the jury could and did arrive at the conclusion that defendant had agreed to buy from the plaintiff all his wood (about one hundred cords), which at the time the bargain was made had been cut, but was scattered about the plaintiff's premises near the bank of the canal; that it was to be drawn to and delivered at the bank of the canal from time to time for the plaintiff; and that after it was so delivered, plaintiff had performed his part of the contract as to each portion of the wood so delivered. If defendant wished to measure it for his own satisfaction, he could do so; it was not necessary that he should measure it to have the property pass to him:

Gimour v. Supple (32 L. Times, 1), and *Turley v. Bates* (10 L. Times, N. S. Ex. 35), establish this; and if the plaintiff did deliver the twenty-five cords for defendant in part performance of the contract, the property in it would pass to the defendant, and it would not be divested by any subsequent act of plaintiff; (Blackburn on the Contract of Sale, 151-2-3.) The doctrine laid down in *Rugg v. Minett* (11 Ea. 210) seems applicable to the case before us. There a quantity of turpentine in casks was sold by auction for the defendant, in whose warehouse it was lying. The casks were marked as of a certain weight, and it was agreed that they should be taken at that weight; but it was further agreed that they should be filled up by the seller. The plaintiff bought thirty casks, and paid money on account. Twenty casks were afterwards filled up by the warehouseman of the defendant; but before the other ten could be filled the whole were consumed by fire. It was held that the property in the twenty passed, but not in the ten, and that the loss must be borne in that proportion.

Suppose, in the case before us, all the wood had been consumed after the delivery of the forty-one cords and the twenty-five cords in dispute, but before the defendant had taken the twenty-five cords away; would not the plaintiff have been entitled to recover the value of these twenty-five cords, because the property in them had passed to the defendant? I think he would; as if so, it seems to me that he must for the same reason fail in this action.

I do not understand that the bank of the canal, where this wood was delivered, was plaintiff's land or property, but rather the property of the Crown; and if plaintiff had a line for the price of the wood, which the evidence rather repelled, he would not probably retain it after having so far parted with the possession as to place it for another person on property not belonging to himself, and not under his control.

On the grounds of appeal taken, I do not think we can properly allow the appeal, or reverse the decision of the court below. If the plaintiff had requested the learned judge to have the question specifically left to the jury, whether the wood, which was the subject of the bargain, was all in *esse* as

cord wood, and whether defendant had purchased the whole of it at a certain rate per cord, to be delivered from time to time on the bank of the canal for defendant; and whether the forty-one cords were so delivered in pursuance of the agreement, and if the twenty-five cords were also delivered there and set apart for defendant under the agreement; and if he had been asked to let them find specifically as to each, and they had negatived any of the questions which, it is now assumed, they have found in the affirmative;—then we could say that the decision of the court below was wrong. But on the broad grounds now taken, and also taken in the court below, the finding of the jury and the ruling of the judge would seem to be in accordance with the facts and the views of the law which we have expressed as sustaining the decision of the case in that court.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

THE BANK OF TORONTO V. MCDougALL.

Chattel mortgage to corporation—Affidavit of bona fides—Pressure—Fraudulent preference—Equities of case, after discussion thereof, left to jury.

Held, Richards, C. J., *hesitante*, that the president, or other principal officer of a corporation, taking a chattel mortgage for and in the name of the corporation, does not act as its agent, but as principal in the exercise of the corporate powers of the institution; and, therefore, that the affidavit of *bona fides*, under Con. Stats. U. C. ch. 45, secs. 1 & 2, is sufficiently made by such officer without the authority in writing necessary under said act in the case of an agent.

Held, also, that such a mortgage by an insolvent, or by one on the eve of insolvency, executed by the debtor under pressure by the creditor, as, for instance, a threat of a criminal prosecution, but given to secure a pre-existing debt, was not a fraudulent preference under Con. Stats. U. C. ch. 26, sec. 18, the pressure used rebutting the presumption of a fraudulent intention on the part of the debtor to prefer the creditor.

The intent with which the instrument is given being a question for the jury the circumstances of pressure attending its execution ought not to be withdrawn from them.

Where both sides have addressed the jury on the *equities* of the case, it is no ground for a new trial that the judge refused to withhold these equities from the jury.

This was an interpleader issue to try whether certain goods were the plaintiff's, as against William McDougall. The case was tried before J. Wilson, J., at the fall assizes for York and Peel, in 1864.

David McDougall, who was the original owner of the goods, carried on business at Thornhill, as a miller and dealer in goods. The defendant was his brother, who carried on a similar business in Baltimore, seven miles from Cobourg. They had another brother, James, who was in business in Montreal.

For some years David had discounted with the plaintiffs bills drawn on the defendant, payable in Cobourg, which the defendant had from time to time accepted, until the 5th of October, 1863, when he declined to accept David's bill on him for \$1000, at two months after date, dated 19th of September, 1863, and another bill, dated 26th September, 1863, for \$1,200, at the same date. Both bills were protested for non-acceptance on the 5th of October. David, on the 29th of September, 1863, drew a bill of this date for \$4,000, on his brother James, in Montreal, payable at three months. As this bill was out of the usual course, enquiries appear to have been made as to his authority to draw it, and he assured the bank he had authority to do so, upon which the bill was discounted, and David got the cash. The proceeds of the other bills were sent to Cobourg to retire acceptances of William then falling due there. In this way William was relieved from these acceptances; and for the bills lastly drawn the bank had David only to look to. James refused to accept the bill for \$4,000, but thought it necessary to write to the bank his reasons for non-acceptance. In his letter he informed the bank not only that David had no authority to draw, but had been expressly told not to do so. The non-acceptance of the first two bills drawn on William, who had had the proceeds of them applied to retire his previous bills, and the non-acceptance of the bill drawn on James, with his explanation, alarmed the bank. Mr. Helliwell, the attorney of the bank, was sent to see David about his debt to the bank. He went three times, and pressed him for security. He charged him with having drawn the bill on James without authority, and added, he might be arrested for having obtained the money on the bill under false pretences. To be relieved from the pressure of this debt and from this charge, and that he might have time to make arrangements to go on

with his business, he made a mortgage to the bank of the goods in question in this matter. It was dated and was executed on the 16th of October, 1863. On this mortgage the plaintiffs claimed the goods.

It appeared from David's account of his affairs, that William, the defendant, had from the year 1861 accepted drafts to the amount of \$20,000, for his accommodation; that to secure him David had given William, in 1861, a promissory note for \$6,000 stock in the Quebec Bank, to the amount of \$2,000, and a mortgage for £3,000 on his property; that William, on the 14th of October, 1863, had sued David on this \$6,000 note, having then paid about \$1,000 for him; that David had not defended the suit; the judgment was obtained upon it by default, and an execution issued, which was placed in the hands of the sheriff of the United Counties of York and Peel, upon which he seized and took into possession the same goods which David had mortgaged to the plaintiffs.

On the 13th of November the plaintiffs sent one Severs to take possession of the goods under the mortgage: he had the consent of the plaintiffs attorney in William's suit, that the sheriff should withdraw from possession. One Metcalf was then in possession for the sheriff. Severs arranged that Metcalf should hold the goods for the plaintiffs instead of the sheriff, and he remained till the 18th, when the sheriff again resumed possession.

The question was whether the goods passed by the mortgage, or were subject to the execution of William against David McDougall.

At the close of the plaintiffs' case it was objected, that the mortgage was bad under the Chattel Mortgage Act, and the act against fraudulent assignments; that as to this latter act enough was shown to prove that David was insolvent when he made the mortgage, and therefore it was void; that, as to the first objection, there was no sufficient affidavit of the *bona fides* of the mortgage, inasmuch as it was made by the President of the Bank, and was not accompanied by any written authority, as the act required.

These objections were overruled and the defence gone into.

David McDougall was called. He said he was insolvent when he made the mortgage ; he was unable to pay his debts by about from \$18,000 to \$20,000 ; that Mr. Helliwell had threatened to have him taken up for obtaining money under false pretences, and had shown him the letter of his brother James ; that after the threat he had made the mortgage ; that he was then unwell, but hoped when he got well to be able to get his affairs so arranged that he could go on with his business ; that on the 16th of November he had made an assignment for the benefit of his creditors, but in the meantime his brother had seized the goods. He also said that he gave the mortgage because he was afraid of being taken up for false pretences, and he did not make it to get the bank a fraudulent preference.

The judge charged the jury to consider the mortgage as having being properly executed with all the requirements of the statute as to the affidavit of its *bona fides*, and that no written authority was required from the bank or its officers. He told the jury that as the parties had both addressed them on the equities of the case, he should not withdraw their consideration from them ; and having read the clauses of the statute left it for them to say whether, under all the circumstances, the mortgage had been given in contravention of its provisions : if so, to find for the defendant, if not, for the plaintiff.

The jury found for the plaintiffs.

In Michaelmas Term last, *C. S. Patterson* obtained a rule *nisi* for a new trial, on the following grounds :—

1. For misdirection of the learned judge in telling the jury that the execution and registration of the mortgage under which plaintiffs claimed were sufficient, and in leaving the issue to be disposed of by the jury on what they might consider the equities between the parties, in place of charging them that if the execution debtor was in insolvent circumstances when he gave the mortgage, the same was void under the circumstances shewn in evidence ; and in leaving it to the jury to find that the mortgage was not given with intent to defeat or delay creditors, or to give a preference to the plaintiffs, if the mortgagor was induced to give it by a threat of criminal proceedings.

2. On the ground that the verdict was contrary to law and evidence, the evidence having clearly shewn that the mortgage was given when the mortgagor was in insolvent circumstances, and that he made the mortgage with intent to defeat or delay his creditors, or with intent of giving the plaintiff a preference over other creditors.

This rule was enlarged until Hilary Term last, when *J. H. Cameron, Q. C.*, shewed cause.

The statute (Con. Stats. U. C. cap. 45) does not make it necessary that the Cashier of a Bank should have a written authority as agent to take a bill of sale or mortgage for the Bank. His written authority to an agent to take such security would of itself "properly authorize him to take such mortgage." If a corporation is within the Statute, though the word "person" is not used to bring it within section 7 of the interpretation act, yet the officers of the bank are to be considered for the purposes of the bank, the mortgagee. The officer of the corporation are considered as substantially the corporation for legal purposes, and are compelled to answer on oath in proceedings against the corporation: *Wyck v. Meal* 3, P. W. 310; *Grant on Corporations*, 57.

There is no doubt that the bank could take this security for a pre-existing debt, and that a mortgage could be made to them; but being a corporation they could not, as mortgagees, make the affidavit. Their officers representing them, being as it were the organ of the corporation, must be authorized to make the affidavit, or corporations are not within the statute, and the mortgage would be good without the affidavit: *Brodie v. Ruttan* 16 Q. B. U. C. 207; *Baldwin v. Benjamin*, Ib. 52.

The evidence shews the plaintiff were put in possession of the property by the withdrawal of the sheriff; and if the mortgage was not registered, yet after that, there having been a continuous change of possession, it was good.

The transfer was not void under Con. Stats U. C. cap. 26. secs. 17, 18, because the transfer was not voluntary circumstances at the time. There was evidence to go to the jury that the mortgagors did not make the assignment with intent to give plaintiffs a preference or priority over his

other creditors, and that finding would not be disturbed to aid the defendant in endeavouring to get the very preference which he sets up against the plaintiffs to defeat their mortgage.

McMichael, with him.—The plaintiffs' demand was not like an ordinary debt: it was contracted on the express understanding that the plaintiffs were to have the additional security of the drawees of the bills, and when they failed to accept, plaintiffs might well claim to have the other securities perfected in place of that which they have failed to get. The decisions under the Bankrupt act shew that when the bankrupt gives securities in conformity with a prior promise to do so, that is not a fraudulent preference. In truth this whole transaction may properly be considered as an advance made by plaintiffs to the mortgagor on the faith of getting the security, and not like getting security simply for a pre-existing debt: *Gotwalls v. Mulholland*, 15 U. C. C. P. 62, and the authorities therein cited, were referred to.

C. S. Patterson, contra.—The affidavit of *bona fides* ought to have been made by the person who knew all the circumstances.

There is no evidence shewing that Mr. Cameron, the president of the bank, had any knowledge of the transaction. Helliwell was the agent who took the security, and knew all about the circumstances, and should have made the affidavit. The mortgage is not attached in the proper form so far as the mortgagees are concerned. It purports to be made between McDougall and the Bank of Toronto, and is attested as follows: "In witness whereof the said David McDougall hath set his hand and sealed thereto, and Angus Cameron, Esquire, said president of the said bank of Toronto, hath affixed hereto the corporate seal thereof and his own hand, the day and year first above written." It is signed, "A. Cameron, President, [L.S.]" It does not appear that the bank executes, or that Cameron *for the bank* executes, but that Cameron, the president, affixes the seal of the bank, and not that the managing body of the corporation has caused the seal to be affixed and the president to sign: *Wells v. Back*, 2 East. 124: *Frontin v. Small*, Stra. 705.

As to the transfer being for the purpose of giving the bank a preference or priority over the other creditors, the evidence clearly shews that David was insolvent. It is true he said he thought he could get through if he was let alone; but looking at his liabilities and assets, no reasonable man could come to any other conclusion than that he could not pay his debts in full—that he was insolvent. The assignment was taken by the bank undoubtedly to secure themselves, and in this way, if held to be effectual, it would give them a preference over the other creditors. The intention was to give the bank a preference in order to escape a prosecution. As to defendant's judgment having been obtained by David's failure to appear and defend, when served with the specially endorsed writ, and therefore equally fraudulent with plaintiffs' assignment, as giving a preference to defendant, the case of *Young v. Christy*, 7 Grant's U. C. Chancery Reports, 312, is an authority for defendant.

RICHARDS, C. J., delivered the judgment of the court.

There is no doubt that the plaintiffs are by law allowed to take a mortgage by way of additional security on personal property for debts contracted to the bank: Con. Stats. Canada, cap. 54, sec. 4. The drafts recited in the bill of sale from David Macdougall to plaintiff, seem to be sufficient evidences of debts contracted to the bank, in the course of its business, to enable the bank to take the mortgage which is the foundation for plaintiffs' claim.

The mortgage itself in point of form is sufficient and can only be avoided because it has not been proved and filed with the proper affidavits of the subscribing witness, and of the mortgagee, in the office of the clerk of the County Court; or because the plaintiffs had no right to receive the mortgage from David Macdougall because he was insolvent, or on the eve of insolvency.

By Con. Stats. of U. C. cap. 45, secs. 1, 2 & 3, it is provided that every mortgage of goods and chattels, not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, shall, within five days from the execution thereof, be registered in the office of the clerk of the County Court of the county

where the mortgagor resides, and also with the affidavit of the mortgagee or his agent, if such agent be aware of all the circumstances connected therewith and properly authorized in writing to take such mortgage, (in which case a copy of such authority shall be registered therewith). Such affidavit, whether of the mortgagee or his agent, shall state that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage; that it was executed in good faith and for the express purpose of securing the payment of money justly due, or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or preventing them from obtaining payment of any claim against him. Then follows the third section, which declares that in case such mortgage and affidavits be not registered as provided, the mortgage shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

The only objection on this point and in reference to the statute is, that the affidavit of the indebtedness of the mortgagor, and that the mortgage was executed in good faith, was made by a president of the bank, and that it is not accompanied by the proper authority in writing to enable him, as the agent of the bank, to take the mortgage security.

By Prov. Stat. (28 Vic. cap. 160), the act amending the charter of the Bank of Toronto, sec 8, it is enacted that for the management of the affairs of the bank there shall continue to be seven directors annually elected by the shareholders, and at the first meeting after their election the directors shall choose of their number a president and vice-president. Each director is to own not less than twenty shares of the capital stock of the bank.

When the president of the bank takes a mortgage of this kind for and in the name of the bank, he does not act as an agent; he is exercising the corporate powers of the institution in the only way in which they can be exercised at all; he acts directly and in chief, and not by delegation. The metaphysical body never can in fact act; but as it does act in contemplation of law, its function must be performed through the instrumentality of others; but such others are

no more agents in the proper acceptation of the term, than the amanuensis who writes the name of another in his presence and at his request, or who takes hold of the hand and guides the movements of the marksman, is an agent. In both these cases the principals are acting for themselves, but through the co-operation of some one else actually present; and so it may be said that the president or other principal officer of a corporation acts in like manner for the body corporate which he represents. As, therefore, the mortgage was not taken by an agent, there was no appointment in writing such as is referred to in the statute. If an appointment had been really required, the very officer who acted on this occasion, if he had been allowed to act as an agent, is probably the person who was competent to give, and would have given, the appointment to himself to take the mortgage, a proceeding not likely to have served any of the purposes of the statute, and a further answer to the argument of a written appointment being necessary under circumstances like the present. The affidavit of the debt being justly and truly due, and in other respects according to the statute, having been made by the very officer representing and acting for the bank in taking the mortgage, may properly be considered as the affidavit of the mortgagee, made in the only way the mortgagee could make the affidavit, namely, through its administrative officer, and so in that respect the requirements of the statute are complied with.

Both of my learned brothers have arrived at this conclusion as to the affidavit made and annexed to the bill of sale substantially complying with the requirements of the statute. Though not being able to see the matter so clearly as they do, I am not prepared to dissent from the conclusions they have arrived at on this point, and we are, therefore, all of opinion that the objection raised as to the form and mode of making, and the person by whom the affidavit was made, must fail.

As to the question raised by the rule, that the mortgage was void under Con. Stat. U. C. ch. 26, sec. 18, because the mortgagor was insolvent or on the eve of insolvency, and was executed with intent to give the plaintiffs a priority over the other creditors of the mortgagor, or to defeat or delay

his creditors, we have recently had occasion to consider the effect of this section of the statute in relation to sales made by persons on the eve of insolvency with intent to defeat or delay creditors: *Harrison v. Tuer* (14 U. C. C. P. 449); *Gotwalls v. Mulholland* (15 U. C. C. P. 63). In these two cases many of the modern decisions in England on the subject of fraudulent preferences and acts of Bankruptcy were referred to, and it will not now be necessary again to refer to the authorities cited there. There have been some few cases not referred to in either of those judgments which also relate to the subject; some of them decided since the two cases in our own courts. These cases I have considered. In *Ex parte Seales v. Baker* (10 L. Times N. S. 315), before Lord Chancellor Westbury, the bankrupt, Baker, had bought goods from Seals to be paid for at three days after delivery in cash. At the expiration of three days after the delivery of the goods Baker said he would be in the receipt of money in a week afterwards, and would discount his own bill. Seals then drew a bill on Baker for the amount at two months, as Seals said, for further security. Seals never parted with or discounted the bill, partly because he did not want to use it, and also because he, Baker, was to discount it. Seals afterwards purchased £200 of cotton from Baker, more particularly to cover his debt. A person, named Orchard, owed Baker £24 19s., and at the instance of Seals, on 10th November, he gave an order on Orchard to pay Seals the amount of his account. On taking the paper to Orchard he hesitated to pay Seals, on the ground that he had received a letter from Tyson & Sons, the petitioning creditors, desiring him not to pay it. Eventually Orchard paid the money to the assignee in bankruptcy. The bankruptcy took place on 19th November, the day on which the bill accepted by Baker fell due. Seals applied to the commissioner to order the assignees to pay him this sum of \$24 19s., which application the commissioners dismissed with costs; on which, Seals appealed. For the assignees it was argued, that the taking the bill of exchange altered the whole character of the debt, which thus became not payable until the 19th of November: this transaction being on the 10th there could have been no pressure, because Baker knew Seals had no

right to sue ; the payment was of a debt before it became due, which was an act of fraudulent preference. The Lord Chancellor gave judgment allowing the appeal. He said the question was one of fact whether the original contract continued or was varied. He went over the facts shewing that Baker was pressed again and again to pay for the cotton before the bill had arrived at maturity, and he admitted his liability to pay, and the appellant succeeded in getting cotton to the value of £200 towards covering the amount, and £22 worth from Norwich for the same purpose, and the order for the payment of money from Orchard, all before the bill matured. The order having been delivered on pressure when the claim was actually due, he held there was no fraudulent pressure.

In *re, Samuel Lilburn*, in the Court of Bankruptcy, before Lynch, J., reported in 12 Law Times, N. S. p. 209, many of the late authorities are discussed as to the effect of an assignment of all a debtor's effects being an act of bankruptcy when made for a pre-existing debt, and the learned judge concludes his judgment as follows : " In all the cases the real question is as to the dealing : is it such as if acted on must stop the trade and produce insolvency as to other creditors, and so necessarily defeat and delay creditors? In this case, is there any doubt of the necessary result of this deed, the plain and contemplated result, namely, that the bankrupt would be put out of trade in hopeless insolvency, and the chargeant be alone protected ; while all his other creditors would be delayed and defeated? * * * I, therefore, hold that this was a dealing with the property so as necessarily to defeat and delay the creditors ; that this was its necessary and palpable consequence, and that chargeant, as well as the bankrupt, must have known of this necessary result. On these grounds I hold that the execution of this deed was an act of bankruptcy, and that all the property dealt with by it has passed to the assignees."

Bills et al. Assignees v. Smith (12 L. Times, N. S. 22) is the last reported case in England I have met with, and Chief Justice Cockburn gives a long and able judgment on the subject of fraudulent preference on the part of an insolvent before bankruptcy. In that case the brother of the

bankrupt was applied to before the act of bankruptcy, but whilst he was insolvent, for a loan. The brother said he had not the money, but could procure it from his bankers on pledging himself to repay it on a particular day. The bankrupt named a day on which he would repay it. His brother procured the money from his bankers on security, and on undertaking to repay it on the day named. The money was paid by the bankrupt to his brother on the day named without pressure, the bankrupt being at the time in embarrassed circumstances. In an action by the bankrupt's assignees to recover the money, as paid by way of fraudulent preference, the judge left it to the jury as a question of fact, whether at the time of the payment the bankrupt contemplated bankruptcy, and told them if he did the assignees were entitled to recover: but if, though aware that bankruptcy was unavoidable, he paid the debt simply in discharge of the obligation he had entered into to pay it on a given day, without intending to give a preference to his brother at the expense of the rest of his creditors, the payment would not be a fraudulent preference. It was held the direction was right.

In giving judgment the Chief Justice, referring to the argument, said: "On the part of the plaintiffs it was contended that the payment having been made by the bankrupt without any application from the defendant, must be taken to have been purely voluntary on his part; and it was urged that as the effect of such a payment must necessarily be to prevent the ratable distribution of his effects among his creditors, and so to defeat the bankruptcy law, and as a man must be taken to intend that which is the necessary consequence of his acts, a payment made spontaneously by a debtor on the eve of bankruptcy, must necessarily be a fraudulent preference. * * * In effect, the argument for the plaintiff comes to this, that no payment made by a debtor on the eve of bankruptcy, out of a fund, which otherwise would be distributable amongst his creditors, without a demand from the particular creditor, would be other than a fraudulent preference. We are unable to assent to this proposition. * * * For it must be borne in mind that the true question in all these cases

is, whether *the intention* with which the payment was made was to defeat the operation of the bankrupt law. It is this intention to act in fraud of the law which stamps the preference of the particular creditor, however morally honest, with the character of fraud. It may not be unimportant to observe how the law as to fraudulent preference has arisen. The statutes relating to bankruptcy contained no provision invalidating payments made prior to the Act of Bankruptcy, but the courts, from the time of Lord Mansfield, held, that if a trader in contemplation of bankruptcy, with a view to evade the bankrupt law, prefer a particular creditor to the detriment of the rest, such a preference was a fraud upon the law, and the transaction could not stand. Lord Ellenborough, in *Crosby v. Crouch* (2 Camp. 166), says that this was an excess on the bankrupt laws, and that in his opinion the cases had gone far enough, and ought not to be extended further. Be this as it may, the intention of the party making the payment to defeat the law was always considered a cardinal point on which the whole question turned. 'When an act is done which is right to be done,' says Lord Mansfield, in *Hannan v. Fisher* (Camp. 123), by which of course he means right irrespectively of the bankrupt law, 'and the single motive is not to give an unjust preference, the creditor will have a preference.' 'A bankrupt,' says Heath, J., in *Hartshorn v. Slodden* (2 B. & P. 585), has the disposition of his property till the moment when he commits an act of bankruptcy, and unless he disposes of it *in fraude legis* his transfer will be good. Fraud changes the complexion of things both in civil and criminal cases.' It is with reference to the intention and motives of the party making the payment that the fact of threats or importunity on the part of the creditor becomes, in the majority of cases, a matter of such importance. Not indeed that the hostile attitude will of itself legalise the payment, if the debtor was uninfluenced thereby, and the payment was made voluntarily by the debtor, and with a view to prejudice his other creditors: *Cook v. Rogers*. The pressure of the creditor becomes material, because, as it is said by Lord Ellenborough in *Crosby v. Crouch*, 'his demand repels the presumption that the bankrupt, on the eve

of bankruptcy, made a distinction amongst his creditors, and spontaneously favoured one of them to the prejudice of the rest.' The pressure of the particular creditor does not make the payment any the less contrary to the policy of the bankrupt law, which seeks to ensure the ratable distribution of the insolvent trader's assets, but which distribution is defeated by the payment to the single creditor, whether importunate or not. Neither can it be said that pressure operates to compel payment by the debtor; for the latter, if he knows that bankruptcy is inevitable, must also know that it will protect his property and his person against the individual condition. The effect of pressure, therefore, in legalizing the payment, is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the laws, from which fraudulent intention alone arises the invalidity of the transaction. * * *

The question whether an intention to defeat the law and to prevent the due distribution of his assets existed in the mind of the trader in handing over the portion of them in question to the creditor, *is one of fact for the jury.*"

The whole judgment may be referred to as the latest exposition of the law on the subject of fraudulent preference: many cases are referred to in it on the subject. The language of Baby, J., in *Hunt v. Mortimer*, is referred to, and seems appropriate to the case before us: "The question of fraudulent preference depends on what passes in the mind of the party making the payments at the time they are made. If he acts in pursuance of a contract, or engagement, or otherwise, under such circumstances that he cannot have a choice, the payments are evidently not the result of preference."

The question of the intent with which the mortgage or transfer was given, was one for the jury, and it is not contended they were mis-directed on the point further than that the threat of a prosecution was referred to as shewing that the instrument was not made with the intent to defeat or delay creditors, or to give plaintiffs a preference over the other creditors of the mortgagor. The cases shew that the influences acting on the mind of the mortgagor inducing him to make the instrument, are proper to go to the jury to enable

them to decide on the intent; and it would have been wrong for the judge not to have allowed the kind of pressure under which the instrument was executed, to be shewn.

As to the exception taken to the learned judge leaving the case to the jury on the equities between the parties, instead of charging them, that, if the execution debtor was in insolvent circumstances when he gave the mortgage, the same was, under the circumstances shewn in evidence, void; if he had told the jury not to consider if the mortgage was given with intent to delay or defeat creditors, or with intent of giving plaintiffs a priority, then there would have clearly been misdirection; but I understand that question was expressly left to the jury. What the learned judge said was, that as both parties had addressed them on the equities of the case, he should not withdraw that from them. I do not understand that he told them to decide according to the equity of the case without regard to the law and facts. After the counsel on both sides have laboured, through the whole case, to shew that in equity each is entitled to a verdict, it would be of little practical use for the judge to tell the jury he would withdraw the equities from them.

If there was evidence to go to the jury on the question of fact, whether this transfer was made with intent to delay or hinder creditors, or to give plaintiffs a preference or priority over them, they, under the authorities, were the proper tribunal to decide that fact, and we ought not to disturb their verdict unless there was some misdirection on some point of importance influencing the verdict of the jury. I fail in the questions raised on this part of the case to see any misdirection: the verdict must, therefore, stand.

As between the plaintiffs and defendant it would seem that the verdict would not work much injustice; for the defendant was relieved (by the proceeds of two of the notes covered by the mortgage) from liabilities on account of the mortgagor to the amount of over two thousand dollars, and the defendant was, through a judgment obtained by the voluntary act of the mortgagor, without much apparent pressure, endeavouring to obtain a preference of the very kind, which he now complains the plaintiffs have improperly obtained in fraud of the act of Parliament.

The plaintiffs, however, in the course they took were only endeavoring to put themselves in the position of being secured in another form as to a debt contracted by the mortgagor, on the clear understanding that they were to have the security of this defendant himself for a considerable portion of the amount, and that of another brother of the defendant for the remaining portion.

Under the circumstances of this case, if there are any facts to be considered by the jury under which they would be at liberty to enquire, whether, as between these two parties, the conduct of the plaintiffs was to carry out a fraudulent intent or not, there is little doubt they would view everything most favourably for the plaintiffs; and if the case should go to another jury on the mere question of fact and intention, there can hardly be a doubt that the verdict would again be for the plaintiffs.

We think the rule for a new trial must be discharged.

Rule discharged.

INGALLS ET AL. V. REID.

Administration—Sale of intestate's lands under fi. fa. against administrator of administratrix—Estoppel—Statute limitations—Con. Stats. U. C. c. 73.

An Administrator of an administratrix has no authority to act for, and cannot represent the intestate, but an administrator *de bonis non* must be appointed to the original estate; and a sale by the sheriff of lands belonging to the intestate under a *fi. fa.* issued on a judgment against the administrator of the administratrix of the intestate is nugatory, and will pass no estate to the purchaser of the lands. But in this case, on ejectment by the plaintiffs, the sons-in-law and daughters of the intestate, to recover possession of lands sold under such circumstances, it having appeared that the former, being tenants for life of an estate of freehold in said lands, and so entitled to dispose of the same, and bind the lands to that extent, uncontrolled by their wives both by the common law, and according to the evidence, by Con. Stats. U. C. ch. 73, had concurred in and in fact suggested and urged the same in question for their own benefit even indicating the mode in which it should be effected; that the party, (a creditor of the estate of the intestate, the ancestor of the plaintiffs) for whose benefit the intended conveyance on such sale was made, had changed his position, and had assigned the judgment, under which the sale took place, for the benefit of one of the male plaintiffs, and at his request:—

Held, that these were acts constituting such an estoppel *in pais* as barred the male plaintiffs, particularly after the lapse of nearly, if not quite, twenty years, from disputing the validity of said conveyance, and that the bar was not removed by their having joined their wives with them in the action, in which the validity of such conveyance was questioned.

Semble, that there was no evidence of conduct on the part of the *female* plaintiffs to establish an estoppel against them, and that on the death of

their husbands the only estoppel created would cease to operate against them.

Held, also, that the Statute of Limitations would, after the expiration of more than twenty years from the accrual of the husband's right to make an entry or bring an action operate as a bar, as long as the coverture lasted, to any action by husbands and wives jointly.

This was an action of ejectment to recover the possession of the undivided three-fourths of Lot No. 22, fronting on the river Thames, in the township of Harwich, in the county of Kent, containing 300 acres, more or less.

The female plaintiffs claimed title as heiresses-at-law of Frederick Arnold, who died seised of the lands.

The defendant defended for the who land claimed; and, besides denying the plaintiffs' title, asserted title in himself, by the possession of himself and of those under whom he claimed.

He also claimed as the grantee of William D. Eberts and Walter Eberts, who conveyed to him by deed, dated 20th of February, 1846, who were the grantees of Duncan McGregor and John Prince, the grantees of the Sheriff of the Western District.

The cause was tried before the Chief Justice of the Queen's Bench, at the last fall assizes held at Chatham, when a verdict was found for the plaintiffs Ingalls and wife and Lamond and wife, for one undivided half.

In Michaelmas Term last, *Becher*, Q. C., for the defendant, obtained a rule *nisi*, calling on the plaintiffs to show cause why the verdict should not be set aside and a new trial granted:

1. For the rejection of evidence by the learned Chief Justice, tendered at the trial for the defendant, shewing the assent of all the plaintiffs to the sale of the land in question in this cause to the sheriff's vendee.

2. For the misdirection of the learned Chief Justice in directing the jury that the assent of the husbands of the said co-heiresses to such sale was not sufficient, and that nothing which the husbands could do would defeat the right of possession of their wives.

3. That the Chief Justice should not have allowed the plaintiffs to take exception at the trial to the sheriff's sale, or any proceeding or matter connected with the same,

but that he should have held them estopped from so excepting.

4. That the verdict was contrary to law and evidence in this, that from the facts proved, and from the documents and proceedings which were given in evidence, the defendant should have obtained a verdict in his favour.

The notes of the learned Chief Justice stated in substance the following facts :

“ It was admitted that Frederick Arnold died seised and intestate, in 1823 ; that Eve Ingalls, Sarah H. Lamond, and Maria Louisa Smith, were three of his daughters and co-heiresses ; that Eve married Ingalls in 1832, and Sarah married Lamond in 1833 ; that Mrs. Ingalls was born in 1812, and Mrs. Lamond in 1815.

“ The evidence for the defence was as follows: Patent to M’Kergan of the land, and deed from M’Kergan to Frederick Arnold produced : exemplification of judgment : Duncan McGregor and Martha McGregor, executor and executrix of John McGregor v. Christopher Arnold and Duncan McGregor, administrators *de bonis non* of Frederick Arnold, entered 22nd December, 1841, for £1,003 10s. 10d., on *sci. fa.* on a former judgment against Christopher Arnold and Duncan McGregor administrators *de bonis non*, in *assumpsit* : judgment on *sci. fa.* by default.

“ George W. Foote said : “ I was sheriff of Kent in 1842, ’43, ’44. I executed the deed shown me, dated 23rd January, 1844. I received the *fi. fa.* against lands mentioned in the deed, and advertised the lot mentioned in it: Colonel Prince was the purchaser. I executed the deed to him for Lot No. 22, on the river Thames, in Harwich. I think I delivered the *fi. fa.* to Col. Prince after the sale: I have never seen it since. There had been a *fi. fa.* against goods returned *nulla bona*. Col. Prince acted for all parties. I prove the signature of the four parties to a deed shown to me, dated 20th February, 1846, from Prince of the first part and Duncan McGregor of the second part, to W. D. Eberts and Walter Eberts of the third part, of the lot in question in fee (registered). I prove the signature, also, of W. D. Eberts and Walter Eberts to deed, dated 15th April, 1846, to the defendant, of the same land, consideration £450.’

“Exemption of writ against goods, and sheriff’s return thereto.

“Duncan McGregor: I am son of John McGregor, and one of his executors, who brought the action: knew Frederick Arnold: knew he was indebted to my father in about £600: after my father’s death steps were taken to recover it: I made an arrangement with Col. Prince that I was to take the farm in question in payment of this debt: Ingalls said to me he wanted to have the matter settled: I did get possession by a deed from Col. Prince.’ [looks at some letters] ‘these are in Ingalls’ writing, except one, which is Lamond’s writing: all addressed to Col. Prince: 1st Nov. 15th, 1841; 2nd. June 9th, 1842; 3rd. June 18th, 1842; 4th. March 19th, 1842; 5th. September 15th, 1842; all these from Ingalls; the one from Lamond, 18th February, 1841’ [none read as yet]; ‘Col. Prince was acting for Ingalls and Lamond; I don’t know whether he acted for any of the other plaintiffs: he acted also for me: I was to have the property for the debt, and I discharged the debt: Col. Prince acted for me as executor for my father, and I suppose as the executor of my father: the land was part of the Arnold estate: the oldest daughter of Arnold was married to one Hartley: she is dead: she left two children still living: I know Mary Louisa Smith: knew her before she was married: she is a daughter of Frederick Arnold.’

“Cross-examined:—‘I was one plaintiff in the suit to recover the debt of Arnold. I became one of the administrators of Mrs. Arnold, widow of Fredereck Arnold: Christopher Arnold was the other administrator.

“Re-examined:—‘She had goods and chattels left her by her husband:’ [Mr. Beecher asks to whose estate he was appointed and acted as administrator; I refuse, because the letters of administration are the best evidence. Mr. Roaf is called on to produce these letters: he does not produce them]: witness says, ‘I gave them to Col. Prince.’

“Letters of 9th June, 1842, and of 15th September, read: The assignment of the judgment on the *sci. fa.* produced dated 28th February, 1844, from Duncan McGregor, surviving executor of John McGregor, deceased, to John Prince, produced by plaintiff: there is on it a memorandum signed

by Col. Prince: [assignment read. Mr. Roaf admits Prince's handwriting, but objects to memorandum being read. Mr. Beecher does not read it. I offered to receive it at Mr. Beecher's peril.]

"W. Crandell: 'I heard conversations between Frederick Arnold and his wife and brother: he spoke of the debt due to John McGregor: he said he could not make a will himself and must leave it to his wife and brother to settle; that they must do the best they could.'

"David Sherman: 'I know the plaintiffs: had conversation with Mrs. Ingalls: she said she was perfectly satisfied with the arrangement that had been made between her husband, Col. Prince, and Mr. McGregor; that they would rather that than that the whole of the lands should be subject to be sold. I knew Beardsly: he married the plaintiff, Mary Louisa Smith; I can't tell where he is: I heard two or three years ago he was in the Penitentiary for forgery.'

"Cross-examined: 'I heard this as to Beardsly from Mr. Ingalls: my conversation with Mrs. Ingalls was between 1840 and 1843: it took place at Ingall's house: don't remember who was present except the family: I remember nothing else of the conversation.'

"Christopher Arnold, jun.: 'I knew Dr. Lamond and Ingalls. I heard my father and Ingalls talking: my father told Ingalls that McGregor was willing to take this lot for the debt if he could get a good title: Ingalls said he was perfectly willing it should be done; and they spoke of its being sold under the judgment and execution by the sheriff. I knew Dr. Beardsly, and I saw him and Mary Louisa Arnold once or twice or oftener at my house: they passed as man and wife: afterwards they went to Michigan and he came back to my house on one occasion.'

"Silas Willeston: 'I knew the Arnold family: heard them all talking about the lot: about its being sold to satisfy the debt; I never heard that they were otherwise than perfectly satisfied: this was after the sale: I have heard that Beardsly is now in the States; I heard that he was married in Michigan to Mary Louisa Arnold.'

"Samuel Fields: 'I knew Dr. Beardsly; he married Mary Louisa Arnold: they were married in Canada; I heard of

him last week from his daughter, a daughter also of Mary Louisa, that he was in Illinois.'

"Reply:—Mr. Roaf objects.

'1. No proof of twenty year's possession: I agree with him.

'2. Defendants claim by title derived from the sheriff's deed: this fails because it appears to be founded on a judgment against Christopher Arnold and Duncan McGregor, administrators of the goods, &c., of Frederick Arnold, deceased, remaining unadministered in the hands of Elizabeth Arnold, deceased. *Non constat*, they were administrators of Frederick Arnold: the judgment is by *nil dicunt*.

'This judgment is invalid to affect the title of the heir, as Duncan McGregor is both plaintiff and defendant, *non constat*, there was any *fi. fa.* against the goods of Frederick Arnold. The writ produced is against the goods of Elizabeth Arnold, deceased, which were of the goods of Frederick Arnold in her hands. It does not warrant the sale of any goods but such as were her own, and had been those of Frederick Arnold; and that these goods were in the hands of Christopher Arnold and Duncan McGregor, as administrators of the goods which were of Elizabeth Arnold, which does not follow the judgment.

'No evidence of writ against lands: the only evidence is a *præcipe* for a *fi. fa.* against lands, and the recital in the sheriff's deed, which he contends is insufficient: it recites a writ against the lands of Elizabeth Arnold, which were of the lands of Frederick Arnold at the time of his death in the hands of Christopher Arnold and Duncan McGregor, administrators of the lands which were of Elizabeth Arnold; and the debt recited in the *fi. fa.* is for not performing certain promises and undertakings of Elizabeth Arnold, in her lifetime, as administratrix.

'*Gardiner v. Gardiner* is contrary to a recent decision in the Privy Council, which shews lands cannot be sold on a judgment against an executor or administrator.'

"*Becher*:—'Not necessary to produce letters of administrator *de bonis non*. As to McGregor being plaintiff and defendant, he is so in absolutely diverse characters, and

there is a co-administrator, who is not open to these objections.

‘There is a *fi. fa.* against the goods, of Frederick Arnold’s estate, though clumsily worded, and it sufficiently follows the judgement.

‘As to the promise being by the administratrix, it must be implied that her promise was only implied from the indebtedness of the intestate.’”

The learned judge wished to reserve all these questions, directing a verdict for the plaintiffs, with leave to the defendant to move to enter a nonsuit.

Becher refused, and said that he preferred the judge should rule.

Roaf stated that he would not reply, and the judge expressed his views, after which *Becher* claimed the right to sum up the evidence, and did so, and arguing that the plaintiffs were precluded by acquiescence and agreement in the sale and conveyance under the judgment and execution. The whole of the argument was founded on the assumption that the judgment and writ were valid, and the sale and conveyance good.

The Chief Justice summed up, directing that there was no judgment or writ in evidence to warrant and sustain the sheriff’s sale, and so as to divest the estate out of the heirs of Frederick Arnold, and directed, as to an undivided half, in favour of Ingalls and wife and Lamond and wife.

Roaf submitted to a nonsuit as to Mary Louisa Smith.

Verdict as to one undivided half for plaintiffs.

The rule which *Becher*, Q. C., obtained in Michaelmas Term last was enlarged until Hilary Term, when *Roaf*, Q. C., shewed cause.—The ruling of the learned Chief Justice on the trial was right in every respect. Though the wife may be bound by fraud, yet she cannot be bound by contract; and if there is anything here in the nature of an estoppel it arises out of contract and not out of fraud. As to the husband, his deed may bind the wife for his life estate or for his estate for her life; but merely binding him by estoppel cannot prevent his wife setting up her estate, and the husband being joined in this action for uniformity’s sake only, the wife cannot be barred either by estoppel or the Statute of Limitations.

There is no estoppel under the facts stated in this case, but rather a misapprehension of the parties' rights. The judgment does not show that they were administrators *de bonis non*: it is only so averred in the *sci. fa.* The judgment seems regular, but the *fi. fa.* under it irregular. The plaintiffs were desirous of putting in the original judgment against Christopher Arnold and Duncan McGregor not produced at the trial, on which the *sci. fa.* produced at the trial was founded. He referred to *Rolt v. White*, 31 Beav. 520; S. C., 7 Law Times, N. S. 345, and 586; *Jumpsen v. Pitchers*, 13 Simons, 327; Sugden's Statutes, Real Property, 2nd ed. 82; *Mein et al. v. Short*, 9 U. C. C. P. 244; *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63; *Scouler v. Scouler*, 19 U. C. Q. B. 106; *Freeman v. Cook*, 2 Ex. 654; *Doe Harley v. McManus*, 1 U. C. R. 141; *Howard v. Hudson*, 2 E. & B. 1; *McDade v. Dafeo*, 15 U. C. R. 386; Con. Stats. U. C., c. 73, ss. 2, 18, c. 88, ss. 1, 2, 42, 45, 46.

Becher, Q.C., contra.—The husband is seised in right of his wife and may convey the estate without the wife's consent for the term of their joint lives and for his own life, if he has an estate by the courtesy; and, therefore, whatever would bar the husband either by estoppel or by prescription would equally bar an action by him and his wife during the coverture. He referred to McQueen on husband and wife, pp. 26, 27. It was shewn by the letters put in, or could have been shewn, if it had been allowed, that the original owner, Frederick Arnold, about the time of his death, and the plaintiffs, male and female, were consenting parties to, and were desirous of the land in question being sold to satisfy McGregor's debt. This was what was really done, and they ought all to be estopped from setting up some formal defects as to the proceedings by which that was brought about. He referred to *Doe Harly v. McManus*, 1 U. C. R. 143, 144, 145; *Doe Wilson et ux. v. Wessels*, 5 O. S. 282; *Pickard v. Sears*, 6 A. & E. 489; *Reg. v. South Holland Drainage Company*, 8 A. & E. 437; *Sandys v. Hodgson*, 10 A. & E. 473; *Doe Dissett v. McLeod*, 3 U. C. Q. B. 297; *Doe Hageman v. Strong*, 4 U. C. Q. B. 510; *Doe Boulton v. Ferguson*, 5 U. C. Q. B. 515; *Nickolls v. Atherstone*, 10 Q. B. 944:

Doe Grooves v. Grooves, 10 Q. B. 486; *Gregg v. Wells*, 10 A. & E. 90; *Howard v. Hudson*, 2 E. & B. 1; *Doe Elmsley v. McKenzie*, 9 U. C. Q. B. 559; *Doe Douglass v. Bradford*, 3 U. C. C. P. 459; *Roe v. McNeil*, 13 U. C. C. P. 189; *Delisle v. Dewit*, 18 U. C. Q. B. 155; Sugden on Vendors, 10th ed. 428; *Doran v. Reid*, 13 U. C. C. P. 393; *Allan v. Levesconte*, 15 U. C. Q. B. 1; *Doe McDonald v. Twigg*, 5 U. C. Q. B. 167; *Harrison v. Wright*, 13 M. & W. 816; Broom's Com. Law, 842, notes.

Douglas with him.—It was admitted on the trial that the female plaintiffs were the heiresses-at-law of Frederick Arnold, who died seised in 1823. There was no other evidence of title, nor anything to shew that the plaintiffs, or either of them, ever were in possession; and it was shewn that Frederick Arnold, before his death, requested that this lot should be given to McGregor in satisfaction of that debt. This action was commenced in March, 1863, and therefore it might be presumed more than forty years from the time plaintiffs' right accrued before this action was brought; at all events, it was more than twenty years. He referred to *Doe Corbyn v. Branston*, 3 A. & E. 63, as authority in his favour on this point.

A further ground of moving to set aside the verdict was added by consent after the first argument, as follows:

And lastly on the further ground, that the learned Chief Justice rejected evidence tendered on behalf of the defendants at the trial, of long possession of the lands in question in the defendant and others from whom he claimed for twenty years and upwards.

The case was argued a second time on the amended rule on the last day of last Hilary Term by *Roaf*, Q. C., for plaintiffs, and *Becher*, Q. C., and *Douglas* for defendant, and stood over for judgment.

RICHARDS, C. J., delivered the judgment of the court.

As I understand the law applicable to the subject of succeeding executors, it is this: the original testator, having appointed an executor who proves his will, is represented by the executor of the executor in the event of the death of the first executor; but if the first executor dies intestate, then

his administrator is not such a representative, but an administrator *de bonis non* of the original testator must be appointed by the ordinary; for the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is, therefore, allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. But the administrator of the executor is merely the officer of the Ordinary, and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator: Williams on Executors, vol. i. p. 222-3. Upon the death of a surviving or sole administrator, in order to effect a representation of the first intestate, the Ordinary, whether the administrator died testate or intestate, must appoint an administrator *de bonis non*; for an administrator is merely the officer of the Ordinary, in whom the deceased has no trust; and, therefore, on the death of the administrator no authority can be transmitted by him to his executor or administrator, but it results to the Ordinary to appoint another officer: Ib. 413-14; see *Elliott v. Kemp* (7 M. & W. 306).

As I understand the papers placed before the court, the judgment on which the *scire facias* was based was in a suit of Duncan and Martha McGregor, executors of McGregor, against Christopher Arnold and Duncan McGregor, administrators of Elizabeth Arnold, administratrix of Frederick Arnold, deceased. Now there was no privity between the administrators of Elizabeth Arnold and the estate of Frederick Arnold, as far as I can see from any authority; on the contrary, the authorities all seem the other way. To bind the estate of Frederick Arnold the letters of administration *de bonis non* should have been taken out to his estate. I suppose, however, the administration was taken out to the estate of Elizabeth Arnold, by parties expecting to reach Frederick Arnold's lands in that way.

The *scire facias* for the purpose of obtaining execution on the judgment recites that Duncan and Martha McGregor, surviving executors of McGregor, had recovered a judgment

against Christopher Arnold and Duncan McGregor, administrators, &c., of Frederick Arnold, deceased, unadministered in the hands of Elizabeth Arnold, deceased, at the time of her death, who was administratrix of the goods, &c., of Frederick Arnold. The execution was awarded and, as exemplified, appears to require the sheriff to levy of the goods and chattels of Elizabeth Arnold, deceased, unadministered at the time of her death, which were of the goods and chattels of Frederick Arnold, deceased, at the time of his death, in the hands of Christopher Arnold and Duncan McGregor, administrators, &c., of Elizabeth Arnold, deceased, at the time of her death, remaining in her hands unadministered of the goods, which were of the said Frederick Arnold, deceased, at the time of his death, £1003 10s. 10d., which were awarded Duncan and Martha McGregor, as executors aforesaid, for their damages which they had recovered by reason of their not performing certain undertakings made by the said Elizabeth Arnold in her life time as the administratrix of the goods of Frederick Arnold, deceased, whereof the said Christopher Arnold and Duncan McGregor were convicted, as appeared of record.

The writ against lands, referred to in the Sheriff's deed, recited that the sheriff was to cause to be made of the lands and tenements of Elizabeth Arnold, deceased, unadministered at the time of her death, which were of the lands and tenements of Frederick Arnold, deceased, at the time of his death, in the hands of Christopher Arnold and Duncan McGregor, administrators, &c., as above recited in the *fi. fa.* against goods, only making it apply to lands.

The sheriff's deed then recites the seizing of the lands under the said writ, the sale of the same to John Prince, Esquire, for the sum of £50. The deed then proceeds to state that by virtue of the writ and according to the statute, and in consideration of £50, he conveyed the lot in dispute in fee to Prince, his heirs and assigns forever, and all the estate, right, title, and interest of the said Elizabeth Arnold, deceased, unadministered at the time of her death, which were of the lands and tenements of the said Frederick Arnold, deceased, at the time of his death, in the hands of the said Christopher Arnold and Duncan McGregor, admin-

istrators of all and singular the lands and tenements which were of the said Eliabeth Arnold, deceased, had in the said lands and tenements and premises, or any part thereof, on the 6th day of August, A.D. 1842, or since or then had therein: *Habendum* to Prince, his heirs and assigns forever, as fully and absolutely as the sheriff under the authority aforesaid could and ought to sell the same, and not further or otherwise: Deed dated 23rd January, 1842.

So far as appears, then, at the time the judgment was obtained, there were no proper letters of administration to any one representing the estate of Frederick Arnold or through which his lands could be reached.

There was an administration of the estate of Elizabeth Arnold, and a judgment appears to have been recovered against her administrators, probably under the erroneous impression that the lands of Frederick could in that way be reached. The *sci. fa.* to obtain an execution on that judgment seems to have been prepared in the view that the proper administration had been granted to Frederick's estate; but the *fi. fa.* against goods and that against lands, as far as I can see, were drawn in accordance with the judgment, and seem to be to enforce the recovery of the demand against the estate of Elizabeth, or, at all events, by proceedings against her administrators, to reach Frederick's lands.

As this could not be legally done, these proceedings, so far as anything passing by the sheriff's deed, or divesting the heirs of Frederick Arnold of their title to his property, seem to me to be entirely nugatory.

The next question for consideration is as to the plaintiffs, or any of them, being estopped from setting up their claim to this property by anything that took place before or after the sale.

The facts given in evidence by the defendant at the trial to establish that proposition are these: Duncan McGregor, son, and one of the executors, of John McGregor, stated that Frederick Arnold owed his father when he died about £600. He made arrangements with Col. Prince that he was to take the farm in question in payment of this debt. Ingalls, one of the plaintiffs, said to him, he wanted to have the matter settled. He got possession by a deed from Col.

Prince : Colonel Prince was acting for Ingalls & Lamond, and for him, McGregor. He was to have the property for the debt, and he discharged the debt. Colonel Prince acted for him in his capacity as executor of his father's estate : the land was part of the Arnold estate. He stated that he became one of the administrators of Mrs. Arnold, and Christopher Arnold was the other. She had goods and chattels left her by her husband.

William Crandell stated he heard a conversation between Frederick Arnold, his wife, and his brother, about the debt due John McGregor. He said he could not make a will himself, but must leave it to his wife and brother to settle ; that they must do the best they could.

David Sherman had a conversation with Mrs. Ingalls. She said she was perfectly satisfied with the arrangement that had been made between her husband, Colonel Prince, and Mr. McGregor. They preferred that rather than that the whole of the lands should be subject to be sold. The conversation with Mrs. Ingalls was between 1840 and 1843, at Mr. Ingall's house.

Christopher Arnold, jun., heard his father and Ingalls conversing. His father informed Ingalls that McGregor was willing to take this lot for the debt if he could get a good title. Ingalls said he was perfectly willing it should be done, and they spoke of it being sold under the judgment and execution by the sheriff.

Silas Willerton knew the Arnold family ; heard them all talking about the lot, about its being sold to satisfy the debt ; never heard that they were otherwise than perfectly satisfied : this was after the sale.

Two letters from Otis Ingalls to Colonel Prince were also put in and read. The first, dated 9th June, 1842, desiring Colonel Prince to see if this and another lot in Harwich had been sold for taxes, and if sold, when the time for redemption would expire, and what will be due on each lot, then proceeds : "Doctor Lamond has written me, that he requested you to see if Mr. McGregor would not accept of one of the following proposals, which as you did not name it to me, perhaps it has escaped your memory : viz., to take two hundred acres of land from the upper side

of Lot 22, Harwich. including the orchard and mill seat, with the principal part of the improvement, and one hundred dollars, and leave us what may be left to make a farm in connexion with a part of No. 21, second concession ; or two hundred acres from the front of 22 and leave us the balance in the rear. I have let out the farm for one crop, but it is done in such a way that most of the rent will be laid out in fencing, and can be no obstacle to our settlement. I will satisfy you for your trouble, or render you any service in my power in this part."

The other, dated 15th September, 1842, is to the following effect: "Dr. Lamond has been over, and we have agreed, if you have made the necessary arrangement with Mr. McGregor (if you think the paper given by Mr. McGregor to Doctor Lamond now in your possession, is sufficient to prevent him from selling more than Lot No. 22, in Harwich), that it is best to have the execution come out and let Mr. McGregor get the title to it as soon as the law will allow him (unless we have an opportunity to sell within the time allowed). If we sell it will be all the better to have the execution out. We wish to have the affair settled with Mr. McGregor as soon as is convenient. I wish you to have it understood, or get Mr. McGregor to bid off Lot No. 22 at a low price, and sign over the balance of his claim to the heirs of F. Arnold, which I believe was the understanding between him and Dr. Lamond."

The judgment in Duncan and Martha McGregor, executors of John McGregor v. Christopher Arnold and Duncan McGregor, Administrators of Elizabeth Arnold, was entered on 25th of July, 1838.

The *fi. fa.* against goods issued under the *sci. fa.* was issued on the 26th October, 1841, and the *fi. fa.* against lands on the 1st August, 1842; and this *fi. fa.* was placed in the sheriff's hands on 6th August, 1842, and on the 7th of the month he seized the lot in dispute and sold it on 25th September, 1843, to Colonel Prince for £50, and conveyed the land to him as fully and absolutely as the sheriff could or ought to do under and by virtue of the authority of the writ, and not further or otherwise, by deed, dated 23rd January, 1844.

On the 20th February, 1846, Colonel Prince and Duncan McGregor conveyed the premises in fee to Wm. D. Eberts and Walter Eberts. The conveyance recited the deed from Sheriff Foot to Colonel Prince of the land; and that the name of the latter was used in the deed as a trustee only for McGregor, for whom, on whose account, and for whose sole benefit, the land was in fact sold to and purchased by Colonel Prince.

It futher recited the sale by McGregor to the Messrs. Eberts for £350, and that he had called on Colonel Prince to convey the same to them. In consideration of the premises, and of 10s. paid to him, Colonel Prince, and £350 paid to McGregor, Colonel Prince assigned, released, and conveyed, and McGregor bargained, sold, ratified, released, conveyed, and confirmed unto the Messrs. Eberts the premisses in dispute, and all the right, title, and interest of each of them therein, in as full and ample a manner and upon the same terms as they were conveyed to Colonel Prince by the sheriff's deed referred to, to hold to the Messrs. Eberts in fee; and they then covenanted for quiet enjoyment of the premises without interruption from the grantors or any person claiming under them. They also covenanted against incumbrance made or premitted by them or either of them, and for futher assurance.

On 28th Feb., 1844, Duncan McGregor, after reciting the recovery of the judgment by himself and Martha McGregor then deceased, executors of John McGregor, against Christopher Arnold and Duncan McGregor, administrators of Elizabeth Arnold, deceased, the issue of execution thereon against lands, and that the sheriff of the Western District had made £50 under the execution, divers good causes him thereunto moving, and in consideration of £450 to him in hand paid by Colonel Prince, assigned to him the residue of the judgment, authorising him to enforce payment of the residue in his name, or to release it.

The following endorsement is on the back of this paper: it does not very clearly appear whether it was proven on the trial or not: "I hereby certify that I have no claim or demand on this assignment, Otis Ingalls, Esq., having arranged the same with the legal representatives of the late

Frederick Arnold ; and I undertake to release and satisfy the judgment at their expense, whenever called on to do so. Dated 26th May, 1854 ; (signed) John Prince."

From this evidence I think it may be inferred that the plaintiff Ingalls and Dr. Lamond, both being interested in the estate of Frederick Arnold, as being married to two of his daughters, who were co-heiresses of Arnold, were desirous that Duncan McGregor should accept two hundred acres (probably the land in question) of the property belonging to Frederick Arnold, to satisfy the claim of John McGregor's estate against that of Frederick Arnold. It is probable that McGregor was willing to accept the proposition. It further appears that it was the desire of Dr. Lamond and Ingalls that the land should be sold under an execution, and bid off for as small an amount as possible, and the balance on their judgment kept alive for their benefit ; and from the papers, I have no doubt the property was bid off by Col. Prince for the sum mentioned in the sheriff's deed, by the mutual understanding of McGregor, Ingalls, and Dr. Lamond, by the desire of the two last-named, and that the judgment was assigned by McGregor to Col. Prince to hold as a trustee for the Arnold estate, in pursuance of such understanding. It is, I think further reasonable to infer from the evidence, that Ingalls, and all the others interested in the Arnold estate, gave up possession of the two hundred acres thus intended to be conveyed, for the purpose of satisfying the claim of John McGregor's estate against Frederick Arnold's estate. If Ingalls and Lamond were suing without their wives, it would seem to be unjust that they should be allowed to dispute the validity of the conveyance of the land now nearly, if not quite, twenty years after these transactions took place ; a conveyance made in the way suggested by themselves ; concurred in by all parties at the time ; believed to be correct then ; when the party for whose benefit the deed was intended to be made changed his position in consequence, and actually assigned a judgment which he then controlled (whatever might have been its value) for the benefit of Ingalls, amongst others, and at his request. McGregor's position was apparently materially changed in consequence of the acts

and conduct of Ingalls and Lamond ; and if matters, which all parties assented to at the time, and have concurred in for so long a period, are now to be disturbed, it will certainly be allowing Ingalls and Lamond to take advantage of acts apparently entered into at their suggestion and for their benefit, so far as they may have been for their benefit, and to repudiate them so far as they may have been against their interest, though at the time right and just, and so considered to be by all the parties interested.

As estoppels *in pais* are always on matters of fact, they must of course be proven in evidence ; and if the jury are satisfied that the evidence leads to the conclusions above suggested, it appears to me the weight of authority is in favour of preventing Lamond and Ingalls from asserting, as far as they are concerned, that the title to the two hundred acres of land did not pass to McGregor's trustees by the proceedings which were suggested by them, and assented to and acted upon by McGregor.

I am aware that the doctrine of estoppel, as it is frequently, though not always properly, called, is not yet considered as settled on a very satisfactory basis ; but, I think, as applicable to the case before us, the weight of authority would be in favour of preventing Ingalls and Lamond from impeaching the deed referred to.

Many of the observations of the late Sir J. B. Robinson, in *Harley v. McManus* (1 U. C. Q. B. 141) will apply to this case ; and some of the authorities referred to on the argument by the defendant's counsel will also sustain the same view. *Lord v. Wardle* (3 Bing. N. C. 680) is somewhat in point. There an attorney, who drew a deed, was estopped from saying the land mentioned in it did not pass by it.

A recent case in the Exchequer, *Swan v. The Australian Company* (7 H. & N. 603), shews the difference of opinion amongst the judges on the question of estoppel arising from negligence. The judges were divided in opinion, and many of the former cases on estoppel of a similar kind are referred to in the judgment.

If this action had been brought by Ingalls and Lamond only, I assume evidence of twenty year's possession on the

part of the defendants or those under whom they claim, would be a good answer to the action. It is contended, however, that by joining their wives, the action may proceed in their joint names, as the wives' interest ought not to be prejudiced by the wrong or negligence of the husbands, and they are only joined for conformity.

In discussing the question of estoppel and of the statutory bar, so far as regards Ingalls and Lamond, I am only looking at it as at common law, and not in reference to our statute concerning the rights of married women, to which I shall presently refer.

The husband, at common law, has a freehold interest in right of his wife in her real estate for their joint lives, both being seised together in her right by entireties, the effect of which is to put the ownership for the coverture entirely in the husband's power. Hence he can alienate this ownership at pleasure, and his conveyance will pass the freehold without the wife's co-operation: Macqueen on Husband and Wife, p. 27. His estate in his wife's lands may be sold to pay his debts: *Doe Moffatt v. Grover*.

After a lapse of twenty years this estate is barred. The question suggests itself for what period? The reasonable answer appears to me to be, as long as the estate continues. The moment the estate of the husband ceases by death, then the right of the wife can be enforced, and that right continues for ten years under the statute after the disability of coverture is removed. The case of *Jumpsen v. Pitchers* (13 Simons, 327), decided that when the husband conveyed his estate, the wife was not barred by being out of possession forty years, because by the husband's deed there was an estate or interest created which prevented the statute running against the wife's future interest. *Doe Bramston* (3 A. & E. 63), decided that when husband and wife were out of possession forty years, though the husband had not conveyed, the wife and her heirs were absolutely barred, though the action was brought within twenty years from the death of the husband. It did not appear quite certain whether the wife was seised of a freehold or not. But Lord Denman in giving judgment said: "It is true that if Mrs. Corbyn (the wife) was the owner, her hus-

band was the tenant by the courtesy, and their son's right of possession did not accrue till after his father's death ; but this furnishes no answer to the positive enactment of limitation (forty years) in the seventeenth clause of the statute."

This case was decided on a motion to enter a nonsuit, and the rule *nisi* was refused. Lord St. Leonards, in his work on the Real Property Statutes (2 ed. p. 82-3), refers to this case, and suggested that although adverse possession is not now necessary, there is a marked distinction between a conveyance and a *mere vacant possession* ; for after the conveyance the husband could not enter against his own act, and the wife would have no right to do so in respect of her estate ; so that she might be barred altogether if her husband lived beyond forty years without having had any power to recover. It may well be doubted that when there is a conveyance the case is not governed by that of *Doe Bramston*. The next section of the work, a new edition having been published, refers to the case of *Jumpsen v. Pitchers*, as sustaining the distinction taken in reference to *Doe Bramston*.

Is there any difference when the *possession is not vacant*, and the husband cannot enter because of the statutory bar of twenty years ? It seems to be assumed that there is, though on principle one does not clearly distinguish why it should be so. All that *Doe Bramston* decides is, that after forty years the bar is complete, if the husband and wife has been out of possession for that time.

Jumpsen v. Pitchers decided, it is not a bar when the husband has conveyed an estate. But neither of these cases decides, that when the husband's estate is barred, that by joining his wife with him he can neutralize the legal effect of the statute as applied to his own estate. If he can this result follows, that as soon as the recovery takes place in the action in the joint names of the husband and wife, and the husband and wife are again in possession, the husband takes that very estate again of which he was barred by the statute, and may again be barred either by the statute or by a sale and conveyance of it.

There is some analogy as to the effect that having a particular estate barred by the statute may have when the particu-

lar estate is merged in the greater one. In Preston on Conveyancing (vol. iii. 577-8), in referring to the effect of merger on the Statute of Limitations and of non-claims, it is stated: "These statutes never operate except against rights and titles of entry and of action. An estate, whilst it is an estate, cannot be barred by either of these statutes. Therefore persons having rights or titles in respect of successive estates cannot, it is apprehended, cause the effect of surrender or merger of the right or title to a particular estate, so as to accelerate the right of the person who is entitled under the reversion or remainder to pursue his remedy and prosecute his right: such merger or extinguishment would prejudice the person who, under the Statute of Limitations or under the non-claim on a fine, had acquired a title as against the rightful owner of a particular estate." At page 579 it is stated: "When there is dis-seisin of tenant for life, and, as a consequence, (with the exception of the king) of a person who has the remainder or reversion, then the release by the tenant for life operates by way of confirmation of title, by adding the right to the seisin, and no real action can be maintained by the person who has the reversion or remainder until the determination of the time of enjoyment conferred by the estate for life. And when the termor for years is bound and no release taken, then it should seem that the disseisor may protect himself in the possession during the term." At the time that work was written, the Statute of Limitations only bound the remedy and not the right: the modern statute cuts off the right as well as the remedy, and vests the legal fee simple in the party who has been in possession during the period: Sugden's Statutes, 9.

If then the rights of parties acquired under the Statute of Limitations are preserved in cases like those just referred to, I see no reason why this should not be under the circumstances of this case. If the barring of the right of the husband does not bar the right of the wife also during the coverture, the statute can have little or no practical operation when the fee simple of a property is in a married woman; for the moment the husband's rights are barred, all he has to do is

to bring an action in the joint names of his wife and himself, and he would at once be restored to the estate which was, by the operation of law, vested in the person in possession. Suppose a party in possession of land for twenty years or more, and this land had belonged to a married woman who, with her husband, was living; suppose the party who had obtained the twenty years' statutory title had been disseised after his twenty years' possession and title had completely matured: if he brought an action against the disseisor, could the latter set up that, as the estate to which the plaintiff in that action had acquired his parliamentary title had belonged to a married woman whose husband was living, therefore he could not recover? I should think such a defence would fail. Now suppose the action to be brought against the husband, being in possession, could he set up that defence? I see no ground upon which he could do so successfully.

Take the ordinary case of an action, where the husband's estate is barred. The husband and wife bring ejectment: the defendant proves he has been in possession twenty years: *tha prima facie* meets the plaintiffs' case. How would the plaintiffs reply in that case? Their right to make the entry occurred more than twenty years before the bringing of the action. The defendant's case can only be met by shewing that the plaintiffs come within some of the exceptions of the statute. Under what exception would they come? Under sec. 28 of our statutes, 4 Wm. IV. ch. 1, the effect of it is to provide that if at the time the right of any person to bring an action to recover land shall have first accrued, such person shall have been under the disability of coverture, then such person may, notwithstanding the period of twenty years heretofore limited shall have expired, bring an action to recover such land *at any time within ten years next after the time at which the person shall have ceased to be under such disability, or shall have died.*"

I do not think that this section enables the person under disability to bring an action after the twenty years have elapsed, if the disability still continues. The power is to bring the action within ten years after the disability has

ceased. The only objection I see to put this reasonable construction on the statute is, that if the disability continues so that the forty years have elapsed, no provision is really made in such a case to avoid the difficulty created by the statute. If such is the true interpretation of the statute the answer is, the legislature thought the period of forty years under such circumstances ought to perfect the title. If it be contended this is unjust, it may as well be reasoned that the legislature are also unjust in not allowing twenty years after the disability has ceased to bring the action, instead of limiting it to ten. But such is the effect of the enactment in both cases, and I can see no good reason why the giving proper effects to the enactment should vary or alter other plain rules and principles of law, or of the statute itself.

Up to this time I have been considering this case in reference to the principles of the common law on the subject of married women. I must not refer to our own Con. Stat. U. C. cap. 73, sec. 2. It provides, "Every woman who married on before the 4th of May, 1859, without any marriage contract or settlement, shall and may after that date have, hold, and enjoy all her real estate not then taken possession of by the husband, by himself or his tenants, free from his debts and obligations contracted after the fourth of May, 1859, and from his control or disposition, in as full and ample a manner as if she were sole and unmarried." It does not appear that Mrs. Ingalls or Mrs. Lamond married without any marriage contract or settlement, and it does appear from one of the letters that one or both of the husbands had let the farm for one crop before the 4th of May, 1859; and I have no doubt that they had taken possession of the real estate before the time of the deed from the sheriff of the Western District to Colonel Prince.

I do not think that the facts bring the case within the provisions of our statute with respect to the separate rights of married women, and that the case must be decided at common law.

On the whole, then, I have come to the conclusion that the plaintiffs Ingalls and Lamond are estopped from bringing this action by the matters *in pais* referred to, and that by

joining their wives with them in it they cannot do that which they could not have done without so joining them. I do not mean to decide that Mrs. Ingalls and Mrs. Lamond are to be barred of their estate because of the estoppel worked against her husbands, and if I could see my way clear as to the action being brought for their benefit without being embarrassed by the inability which rests upon their husbands. I would as to that probably say, that the facts failed to shew any act or conduct on their part out of which an estoppel *in pais* would work as against them. In the event of the death of the husbands I should think they would not be embarrassed by the estoppel that operates against the husbands.

As to the Statute of Limitations, I think it operates as a bar to the action by the husbands and wives as long as the coverture exists, and if the defendant had shewn that more than twenty years had elapsed since the right accrued to Ingalls and Lamond to make an entry or bring this action, it would be a good bar as to the bringing of this action.

In arriving at these conclusions I confess I do so with a feeling of distrust as to the correctness of my own judgment, particularly as my views conflict on these two questions with the ruling at *nisi prius* of his Lordship the Chief Justice of Upper Canada, before whom the case was tried; but having given the matter my best consideration, and having arrived at the conclusions I have mentioned, I am bound to declare them as the judgment of the court in this matter.

I alone am answerable for the views of the law expressed, as my learned brothers were each, when at the bar in some way concerned in matters connected with the litigation in this suit, and they prefer not taking any part in the judgment.

The grounds set up in the rule are not quite in the form to bring up the questions as I have disposed of them; but they were argued in the manner I have discussed them, and I understand the parties were desirous of obtaining the views of the court on the points as now disposed of.

There will, therefore, be a rule for a new trial without costs for rejection of the evidence to shew that defendant had been twenty years or more in possession before action brought. It does not appear that the learned Chief Justice was asked

to direct the jury as to the effect of the evidence to work an estoppel *in pais* against the husbands of Mrs. Ingalls and Mrs. Lamond, and if they were satisfied of the facts to find for defendants, because the male plaintiffs were estopped from disputing the deed to Col. Prince.

The rules should go for a new trial for rejection of evidence.

Rule absolute for new trial.

MOORE V. BOYD ET AL.

Partners—Execution of deed by one for both—Allusion on subsequent trial to former verdict—Alteration in entry of verdict on record.

Held, that where one of two partners signed in the name of both in the presence of the other, and for him with his assent, though there was but one seal, it was the deed of both.

It is no ground for setting aside a verdict that the counsel merely referred to the verdict on a former trial, expressing a hope that the jury would give the same verdict as had been given before, but desisting when the allusion was objected to, unless the judge who tried the cause is satisfied that the matter was pressed unfairly and with the view of exercising an improper influence on the jury.

Where a verdict has been erroneously entered on one count, the record may, at any time afterwards, by leave of the judge who tried the cause, be altered, and the entry thereof made on another count.

Held, also, that where by mistake a verdict for a certain amount is entered on the record, and the foreman of the jury, before the jury separate or leave the box, points out the error, the judge is right in erasing the entry and making in lieu thereof another to which the jury have assented as being their verdict.

The first count of the declaration set out a covenant dated the 5th of March, 1863, whereby defendants agreed with plaintiff to receive from the plaintiff, free on board at Montreal, certain tobacco, the quality to be equal to that at that time sold by defendants called Union Jack Brand; and defendants covenanted with plaintiff to pay for the same at 35 cents a pound, and it was provided that the tobacco was to be delivered, one half during the month of May then next, and the other half during the month of June then next; and the defendants covenanted to pay for the tobacco by promissory notes payable at four months from the date of shipment of the tobacco, which was to be about the middle of the months of May and June; and plaintiff delivered free on board at Montreal aforesaid, one half of the said tobacco during the said month of May, and the other half during the

said month of June on the terms aforesaid; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to be paid for all the said tobacco by the said promissory notes of the defendants; yet they did not pay for said tobacco or any part thereof by their promissory note or notes, or otherwise, but wholly neglected and refused so to do.

The second count set out the agreement the same as in first count, and then proceeded to allege, that although plaintiff did deliver to defendants, free on board at Montreal, during the said month of May, on the term aforesaid, one half of the said tobacco, which defendants then and there accepted and received from plaintiff, and all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle plaintiff to be paid for said tobacco as delivered by the notes aforesaid of defendants, yet they did not pay for the said tobacco so delivered as aforesaid by the promissory notes of the defendants, or otherwise, but had hitherto wholly neglected and refused so to do, and the plaintiff further said that although all conditions were fulfilled and all things happened, and all times elapsed necessary to entitle the plaintiff to have the other half of the tobacco accepted and received as aforesaid by the defendants, free on board at Montreal, yet defendants did not nor would accept or receive from the plaintiff the said other half of the said tobacco, free on board at Montreal aforesaid, or otherwise howsoever, or pay for the same by the promissory notes of defendants, or otherwise howsoever, but wholly neglected and refused so to do.

There were several other counts in the declaration not necessary to be referred to.

Defendants pleaded,

1st. To the first and second counts of the declaration, *non est factum*;

2nd. To first count, that plaintiff did not deliver to defendants, free on board at Montreal aforesaid, the said tobaccos of the quality aforesaid.

3rd. To first and second counts, that defendants were induced to enter into the said agreement by fraud and misrepresentation as to quality of tobacco.

5th. To second count that they did not accept or receive, nor did the plaintiff so deliver free on board at Montreal aforesaid or otherwise, the tobacco of the quality aforesaid in said count mentioned, or any part thereof, as therein alleged; nor did defendants ever so refuse to accept or receive the said tobacco in second count mentioned of the quality of said tobacco therein mentioned, or any part thereof; nor was the plaintiff so ready to deliver same, nor did he offer to do so, but neglected and refused so to do, although defendants were at all times ready and willing to accept and receive the same.

There was distinct evidence of the delivery of the first half of the tobacco to the forwarders in Montreal, to whom the plaintiff was directed to deliver it; and it appeared from the evidence that defendants were to direct by what forwarding house they would have it sent. They desired the first to be forwarded by Messrs. Perry and Black, and it was delivered to them free of charge. On its arrival in Toronto the quality was objected to, and a correspondence was entered into between the parties in relation to it. The defendants did not give their notes for the first half according to the agreement: plaintiff had the remainder of the tobacco ready to be delivered to defendant before the time mentioned in the contract, and on the 2nd of June notified them the balance of the tobacco was in store subject to their orders for shipment in accordance with the terms of the contract, and requested their attention to the matter. The defendants made no reply to this letter, and did not direct by what forwarding house they would have it shipped. The plaintiff in the meantime kept the tobacco on hand ready to be delivered to the defendants. The contest at the trial was really whether the tobacco was of the quality required by the agreement, and the jury had the whole matter left to them, and they found for the plaintiff.

W. H. Burns moved for a rule *nisi* to shew cause why the verdict for the plaintiff on the first and second counts of the declaration should not be set aside, and a new trial be had between the parties on the grounds of the said verdict being contrary to law and evidence, and the direction and charge of the learned judge who tried the cause; and also for misdirection of said judge

in telling the jury that under the evidence they ought to find that the deed sued on was the deed of both defendants, and in telling the jury there was evidence thereof, when on the contrary it was the deed of the said J. Boyd alone; and also because the plaintiff's counsel, in his closing address to the jury, told them that on a former trial between the said plaintiff and the said defendant for the same cause of action as this, the jury gave the plaintiff a verdict, and he trusted this jury would do as that jury had done, or to that effect, thereby prejudicing the minds of the jury, or endeavouring so to do, against the defendants; and on the ground that the plaintiff was not entitled to more than nominal damages on the second count of the declaration for the defendants not accepting the tobacco therein mentioned, and should not have been allowed to give evidence of such special damage, and the verdict should at least be reduced by the amount of such special damage so allowed the plaintiff; and on the grounds that the plaintiff claimed in both counts the full price of the whole tobacco and not only damages for the delivery of the last half thereof, and the plaintiff should either have had a verdict for the full price thereof, or there should have been a verdict for the defendants and not a verdict for such damages for the non-acceptance thereof only; and on grounds that the verdict was first given in by the jury and recorded for \$875 damages only, and afterwards altered and entered, as it now is, against the will of the defendants; and on grounds of misdirection in the learned judge telling the jury that there was evidence of the delivery of the first half of the tobacco, and of the plaintiff's readiness and willingness to deliver the second half thereof, when such second half was never delivered free on board at Montreal, which it should have been, and which was in direct issue on the record and so avoided the whole contract, and at all events prevented the recovery of any damages for the non-delivery of the second half thereof, nor did the defendants ever refuse to receive same; and on grounds disclosed in affidavits and papers filed; some of such grounds being, that the plaintiff's agent represented that the tobacco which the plaintiff was selling when the contract was made was equal to that of the same name or brand previously obtain-

ed from the plaintiff to him and his partner by the defendants, and that the tobacco to be delivered was to be of that quality ; that no sample was produced or given to the defendants at the time of entering into the contract ; that the plaintiff was told how all the tobacco was to be sent ; and on the ground that the evidence of C. Johnson, one of the plaintiff's witnesses, as to the proper mode of manufacturing this kind of tobacco, was not to sweat it which was incorrect. He cited *Bloomley v. Grinton*, 9 U. C. R. 457 ; *Poole v. Whitcomb*, 12 C. B. N. S. 770 ; *Watson v. Gaslight Company*, 5 U. C. R. 244.

RICHARDS, C. J., delivered the judgment of the court.

In this case we thought it better to look over the evidence before deciding whether we would grant a rule or not. The legal grounds suggested on moving the rule did not seem to require much consideration, and we have now looked over the evidence and come to the conclusion that no rule should be granted.

The verdict cannot be considered as contrary to law and evidence, or the direction of the judge ; for the case was expressly left to the jury by the judge, and there was plenty of evidence to justify their finding.

On the point of misdirection as to the agreement being the joint deed of both defendants. In *Ball v. Dunsterville* (4 T. R. 313), it seems to have been decided, that if A. execute a deed for himself and partner by the authority of his partner and in his presence, it is a good execution, though only sealed once. This case is referred to, and its authority is not doubted, in the latest text books : Addison on Contracts, 41. In Vesey's Reports, vol. 3, p. 578, the Lord Chancellor (Loughborough) said, " In *Ball v. Dunsterville*, one of the partners in presence of the other put his name to the bond and executed it, the other standing by. I think the court was right in holding that it was not necessary both should hold the paper." In the notes to the American edition (Summers') of Vesey, it is stated at p. 573, vol. 3, of a deed so executed, " If executed in the presence and with the assent of the other parties, it shall be deemed the deed of

all." Story on Partnership, sec. 120. There are several American authorities referred to as establishing the same doctrine. *Rex v. Longhnor* (4 B. & Ad. 647), is somewhat in point.

Here the judge left it to the jury to say whether one of the defendants signed in the name of both, in the presence of the other and for him ; and if so, and the other assented to it, though there was only one seal, it was the deed of both. We think the ruling right both on reason and authority.

The next ground on the motion paper is, that the plaintiff's counsel in his closing address told the jury that on a former trial between the plaintiff and another plaintiff and defendants for the same cause of action as this, that the jury gave the plaintiffs a verdict, and he trusted that this jury would do the same as the former jury, thereby prejudicing the minds of the jury against the defendant. The learned judge, on being referred to, stated that some remark of the kind was made to the jury ; that both sides during the cause had made reference to the former trial without any objection, and when the counsel in his closing address made the remarks complained of, and it was objected to, the counsel at once stated he had no wish to violate any rule of practice in the matter, and the jury were told that the case must be decided on its own merits and not by the verdict of a former jury.

The learned counsel in moving the rule seems to have had an impression there was a decided case on the point shewing that it was irregular to refer to the verdict on a former trial, but he was not able to give us the case. Since the rule was moved for we have been referred by the reporter of the Court of Queen's Bench to the case of *Case v. Benway* (18 U. C. Q. B. 476). The cause had been twice tried at Picton, and verdicts rendered for the defendant, which were set aside as against evidence. The venue was changed to Kingston, and on a third trial there a similar verdict was given. In making the rule absolute for a new trial, Sir J. B. Robinson, C. J., after observing that he thought the jury had decided on that as on the former trials against the weight of evidence, and as there really was no point of law involved said, "I should have been against con-

tinuing the litigation if the case could have been said to have gone to the jury upon the last trial without any efforts having been made to prevent its being calmly and fairly disposed of on its merits. The judge who tried the cause thought it had been endeavoured strongly and unfairly to impress upon the jury that as former juries had disregarded what the judge said appeared to be the legal rights of the plaintiff, they ought not to show less spirit and firmness than had been shewn on former trials." The Chief Justice concurred in granting a new trial, in the hope the cause would have the advantage which every case should have of going to the jury without prejudice from such appeals as had been mentioned being made to them. He concluded his judgment by saying he might have been willing to let the matter rest where it was, if the learned judge who heard the cause had not thought that the trial was unfairly prejudiced by the term in which the former verdicts were referred to, and the earnest manner in which the jury were urged to take their own course, without attending to the right view to take of the effect of the evidence upon the legal rights of the parties.

I have no doubt if the counsel for either party should persistently refer to the former verdicts in a case, with a view of influencing the verdict of the jury after it had been objected to, the court would feel inclined to set aside a verdict gained under such improper influences. In *Pool v. Whitcomb* (12 C. B. N. S. 770, S. C. 6 L. Times, N. S. 783) the court seem to have acted on the principle that a verdict would be set aside when the jury acted under the influence of observations of the counsel, rather than from the evidence assessing damages. There the plaintiff's counsel in his general reply told the jury that unless they gave a verdict for more than £5 he would in all probability have to pay the costs. On this representation the jury found for plaintiff, £5 5s. The court set aside the verdict. I think, however, no case can be found where the verdict has been set aside merely because the counsel referred to the verdict on a former trial, unless the judge who tried the cause was satisfied that the matter was pressed unfairly, and with a view of exercising an improper influence on the jury. I do not understand the

learned judge had that impression as to the conduct of plaintiff's counsel on this trial. In fact, he considered the matter of so little importance that he had not even made a note of the circumstances complained of.

The next ground taken in the motion is, that plaintiff is not entitled to more than nominal damage on the second count of the declaration, and should not have been allowed to give evidence of special damage. I see nothing in the law or facts to sustain this objection, nor was it taken at the trial, as far as I can see.

The next ground is, that the damage allowed on the second count should be reduced to nominal damage, on the ground that the plaintiff claimed on both counts the full price of the whole tobacco, and not merely damages for the non-delivery of the last half thereof; and the plaintiff should either have had a verdict for the full price thereof, or there should have been a verdict for the defendant, and not a verdict for such damages for non-acceptance thereof.

The proper entry of the verdict would seem to be on the second count, as that really covers the whole ground of action; and the verdict, I apprehend may be so entered now by leave of the learned judge who tried the cause: on this being done there would seem to be no necessity for any further discussion on this ground.

The next ground is, that the verdict was first given by the jury and recorded for \$875 damages only, and afterwards altered and entered as it now is against the will of the defendants.

The learned judge reports that when the jury came in, after they were asked if they had agreed on their verdict and how they found, it was understood they answered that they found for the plaintiff for \$875 damages, and it was so entered on the record; and on being read over to them by the clerk, and told to hearken to their verdict, the foreman of the jury said it was wrongly entered; that what they found was the \$875 damages for not accepting the latter half of the tobacco, and the whole value of the other half which was delivered. On this the verdict of \$875 was erased with a pen, and the learned judge entered on the back of the record

"Verdict for plaintiffs, \$3,765 damages, on 1st and 2nd counts, and for defendants on the other counts;" and on this being read to the jury they assented to it as their verdict.

The defendant's counsel objected to this being done at the time.

I see no reason for interfering with the verdict on this ground. The very object in reading over the entry to the jury before they are allowed to separate, is to ascertain if it had been correctly understood and properly taken down, and if not that it may be corrected.

There is express authority on this point in a criminal case: *Regina v. Vodden* (23 L. J. Mag. C. 7, S. C. 6. Cox Crim. Cases, 226). I transcribe a note of it, as abstracted at page 87 of vol. xiii., U. C. C. P. Reports: "One of the jury delivered a verdict of not guilty, which was entered by the clerk of the peace on his minutes, and also by the chairman of the Quarter Sessions in his note book. The prisoner, who was indicted for felony, was then discharged out of the dock; but others of the jury interfered, and said their verdict was guilty. The prisoner was immediately brought back and the jury was again asked and said guilty, and sentence was thereupon passed." The judges, on a case reserved held that the original mistake was corrected within a reasonable time. Pollock, C. B., said; "I remember the clerk used to say, 'Gentlemen of the jury, hearken to your verdict while (as) as the court records it; you say the prisoner is not guilty, and that is the verdict of you all.' Had this form been adopted *it would no doubt have been competent to the jury, when so called upon, to have corrected the mistake.*" Parke, B., also observed: "I infer from the case that the ancient form of calling on the jury to hearken to the verdict was abandoned, which is a great error."

The next ground is misdirection, in telling the jury there was evidence of the delivery of the first half of the tobacco, and plaintiff's readiness and willingness to deliver the second half, when such second half was never delivered free on board at Montreal, which it should have been, and which was in direct issue on the record, and so avoided the whole contract; or at all events prevented the recovery of

any damages for a non-delivery of the second half thereof, nor did defendants ever refuse to receive the same.

There is express evidence of the delivery of the first half. There is evidence that defendants were to inform plaintiffs when they would be willing to receive the second half. The evidence shews plaintiffs had the whole of the tobacco manufactured ready to be delivered by the 2nd of June; and the letter of that date shews readiness and willingness and an offer to deliver according to the contract. There is nothing to shew that defendants were ready and willing to accept or offered to do so; on the contrary, all the evidence in the case shews they were not willing to accept, because they alleged the article about to be delivered was not of the quality they had contracted for. The delivery and acceptance were contemporaneous acts: plaintiffs could not deliver unless defendants would accept, and the evidence shews readiness, willingness, and an offer to deliver, and notice to defendants.

I fail to see any misdirection on this point: it was left as a matter of fact to the jury, and the issue on the second count seems rather to raise the question of the quality of the tobacco which was ready to be delivered and accepted, rather than the fact of readiness to deliver and accept.

The grounds referred to as disclosed in affidavits and papers filed, seem to me to be matters of fact on which the jury have passed their opinion under a charge not objected to by defendants.

As to the finding of the jury, there was evidence both ways, and the real contest between the parties was on matters of fact, which are for the jury to determine. If they had decided in favour of the defendants we probably should not have disturbed their verdict. Two juries have in fact pronounced on the questions in issue before the parties, both unfavourably to the defendants. We have had the advantage of going over all the evidence with Mr. Justice John Wilson, before whom the facts were investigated in the former trial, and he quite concurs with the rest of the court that there are no grounds on which we can properly interfere to set aside this verdict.

Rule refused.

CROOKS v. DICKSON.

Covenant for rent—Interest—Reference to matter—Defendant resident abroad—Con. Stats. U. C. c. 22, sec. 161.

Held, that under Con. Stats. U. C. ch. sec. 161, the master is empowered to ascertain the amount for which final judgment is to be entered not only in cases in which he could, but in cases which he could not before that act have computed what was due; and that the fact of the defendant being resident out of the jurisdiction, is no objection to a reference being directed for such purpose.

Held, also, that in an action of covenant for rent, an order by a judge in Chambers, directing the master to allow the plaintiff interest on the amount claimed on the writ of summons, not specially indorsed, from the date of said writ, was properly made, although no interest was claimed in the declaration.

E. Crombie moved for a *rule nisi* to set aside an amended order made by Mr. Justice Adam Wilson, in the words following:—

“Upon reading the summons in this cause and upon hearing the parties, I do order that the master of this honourable court, on the entering of the judgment in this cause, do, on the computation of the amount due the plaintiff, allow him interest on the amount of his claim endorsed on the writ of summons in this cause: and I do further order all further proceedings in this cause, from the date of the said writ of summons be stayed until an application can be made to this honourable court to rescind or vary this order, such application to be made this day, or as soon as counsel can be heard.”

The original summons was served on the defendant as a British subject residing out of the Province, and he appeared to the writ. A declaration was filed and served on his attorney.

The declaration was in covenant on a lease of land in the City of Toronto: Breach, the non-payment of five year's rent and taxes, the yearly rent being £210, free from all taxes. The defendant pleaded to the declaration. To the plea the plaintiff demurred, and judgment was given for the plaintiff on the demurrer.

RICHARDS, C. J., delivered the judgment of the court.

When the learned judge made the order in question he understood the whole matter in dispute between the parties was, whether the plaintiff was entitled to have interest added

to the rent payable under the covenant set out in the declaration in entering final judgment against the defendant, and under that impression he made the order. The defendant's counsel, however, in moving his rule, contended that the plaintiff was not in a position to enter final judgment, not having signed interlocutory judgment, and not having had it referred to the master to see what was due the plaintiff. He further urged that as the writ was not a specially endorsed writ, and the proceeding was against the defendant as a British subject residing out of the jurisdiction, the damages must be assessed by a jury, and it could not be referred to the master to ascertain the amount for which final judgment was to be entered.

The motion was for a rule *nisi* to rescind the amended order, on the ground that the learned judge had no power to make it on the materials which were before him, and on the ground that, as the plaintiff after having made the application elected to give notice of assessment of damages, he was not, under the judgment of the learned judge, entitled to the order. If anything turns on the last point, he should first apply to the learned judge who made the order, to rescind it.

The learned counsel in moving the rule stated he could find no authority for holding that it could not be referred to the master to ascertain the amount for which final judgment was to be ascertained, because the proceeding had been commenced against the defendant as an absent defendant. In Day's Common Law Procedure Act, pp. 79 80 & 81, it is laid down, that when the defendant is within the jurisdiction, in actions on bills, notes, awards, actions of covenant for rent (2 Wm. Saunders 107 N. 2), for mortgage money, or arrears of annuity, the writ may be specially endorsed. If the defendant resides out of the jurisdiction, there must always be an enquiry. Interlocutory judgment must still be signed in cases not within sec. 25, &c., of the English Common Law Procedure Act. The order to refer is obtained on an affidavit of the cause of action, and stating that interlocutory judgment have been signed. The same course seems pointed out by Chitty's Archd. 11 ed. 922.

In not to *Holdipp v. Otway* (2 W. Saunders, 107), it is laid down, that the court may, if they please, assess damages upon an interlocutory judgment, and give final judgment thereon: an inquisition is only a matter of course taken to inform the conscience of the court. Buller, J., in *Thellusson v. Fletcher* (Dougl. 316); *Gould v. Hammersley* (4 Taunton, 148), is said to have observed, that writs of enquiry are often sued out in cases wherein they are not necessary, as, for instance, in actions on covenants for payment of a sum certain.

In the same note to Williams Saunders, it is stated that Lawrence, J., in *Blackmoor v. Flemyng*, referred to *Holdipp v. Otway*, with respect to the prothonotary's taxing interest by way of damages, and that it was at the plaintiff's option either to refer it to the prothonotary to do so, or have a writ of enquiry of damages.

In *Roe v. Apsley* (1 Sid. 452), judgment was obtained in default upon a judgment, and it was moved for the plaintiff that the court should tax the damages, *namely interest*, without a writ of enquiry, and after some doubt it was referred to the secondary to tax the damages. The court will not only refer it to the proper officer to compute what is due on bills of exchange and promissory notes, but also in covenant for rent, or for mortgage money, or for arrears of accounts: (Page 107 *a*, Wms. Saunders, note *c*).

In Wms. Saunders (Vol. i. page 109, note 1), it is laid down, that "when the demurrer is determined, and the plaintiff is content to take damages only on the judgment on the demurrer, he may execute a writ of enquiry on the judgment, and enter a *nolle prosequi* as to the issues, which may be done at the time of entering final judgment." Upon the same principle, when one of the counts in the declaration is on a bill of exchange or promissory note, and there is a demurrer to that count and judgment for the plaintiff, and issues are joined on the other counts, the plaintiff may, according to the modern practice in cases of judgment by default on bills of exchange and promissory notes, which is substituted in lieu of a writ of enquiry, refer it to the officer to compute what is due for principle and interest on the bill

of exchange, &c., on that count, before a *nolle prosequi* is entered as to the issues.

I have no doubt under the 161st sec. of the Con. Stat. U. C. ch. 22, similar to sec. 144 of 18 Vic. ch. 43, and sec. 94 of Eng. Act, 15 & 16 Vic. ch. 76, that in all cases where a matter could be referred to the master to compute what was due in a cause before the passing of the Common Law Procedure Act, it can now be referred to the master to ascertain the amount for which final judgment is to be entered. I also think this power extends much further, and under the statute the courts will now direct the damages to be ascertained by the master in cases where they would not have done so before the passing of the statute. If the matter is properly before the master for his decision as to the amount for which final judgment is to be entered, I see no reason why interest to the full amount directed by the order may not be allowed to the plaintiff in the nature of damages; the authorities seem to warrant it. As to the reference not being regular when the defendant resides out of the province, the statute seems to authorise and require a reference of this kind; and I see no reason for interfering on that ground.

The plaintiff I presume, before he has his damages ascertained or enters his judgment, will see that he is in a proper position under the practice to have those steps in the cause taken. When the judgment is entered, I see no reason why the interest directed to be allowed by the learned judge should not be computed. The order does not in itself direct or permit the entry of the judgment at any particular time, and does not imply that the judgment will be entered when the plaintiff is not in a position to take that step. All the judge assumes to decide is the right of the master to allow interest. We think he has not on this point decided too favourably to the plaintiff, and we decline to grant the rule sought for.

Rule refused.

MEMORANDA.

During this term the following gentlemen obtained the necessary certificates qualifying them for call to the Bar :—
J. HUTCHINSON ESTEN, J. C. HATTON, G. Y. SMITH, W. C. LOSCOMBE, SUTHERLAND MALCOMSON, W. SIDNEY SMITH, A. S. HARDY, C. S. CORRIGAN, JOHN MCINTYRE.

TRINITY TERM, 29TH VICTORIA (1865).

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

CROOKS v. DICKSON.

Defective application—Discharge—Renewal in Chambers—Practice.

The court discharged with costs a rule *nisi* to amend a judge's order, because the pleadings, on which the rule purported to have been moved, were not in fact before the court, nor were they disclosed by the affidavits filed, and it was impossible rightly to decide the case without reference to them.

Semble, that where an application, cognizable in chambers, has been made to the court and discharged, but not on the merits, it may be afterwards renewed before the judge in chambers.

During the present term, *R. P. Crooks* obtained a rule *nisi* on the defendant to shew cause why the order made by Mr. Justice Adam Wilson in this cause, on the 28th of July, should not be amended by adding, “That the Master of this Honourable Court do enter final judgment for the said plaintiff for the amount so due to him under the said lease and the order of the said Mr. Justice Adam Wilson of the 17th day of May last past;” and why the said judgment should not be entered accordingly for the plaintiff; and that the words “and taxes” be struck out of the declaration, and that the same be amended accordingly. Or why the court should not make such other order herein as might seem meet and just, on grounds *disclosed by the pleadings and orders* in this cause and the affidavits filed.

The order, which the plaintiff was desirous of amending, directed that it should be referred to the master to ascertain and compute the amount due by the defendant to the plaintiff under the lease sued on in the cause, and for the interest thereon, and that the costs of the application, and the subsequent costs attendant and consequent thereon should

be costs in the cause, to be taxed to the plaintiff; and it was further ordered that the damages laid in the declaration should be increased by £250. The order of the 17th of May directed that the master, on entering judgment, should, in ascertaining the amount due the plaintiff, allowed him interest on his claim endorsed on the writ of summons from the date of the issuing of the writ.

The facts disclosed in the affidavit of the plaintiff's attorney necessary to be noted, were, that the court, in Michaelmas Term, 1863, gave judgment in the plaintiff's favour on his demurrer to the defendant's plea, but gave no judgment on the plaintiff's demurrer to the defendant's last rejoinder; that the rule in accordance with the judgment was taken out and proceedings taken to enter judgment in the plaintiff's favour, there being no plea left on the record, and also to tax the costs; but when the matter came before the master he declined to allow the plaintiff's interest on his claim, and the order of the 17th of May was obtained. This order was moved against, but the court refused a rule: another effort was made to sign judgment, when the master refused to enter it. Subsequently the order of the 28th of July was obtained, and an effort was again made to sign judgment and tax costs, when, after proceeding with the taxation, several days, objection was made, on behalf of the defendant, to plaintiff signing final judgement, and the master ruled the last-mentioned order was no direction to him to enter judgment, and declined to do so.

It also appeared from the affidavit, that since the judgment of this court refusing a rule *nisi* set aside the order of the 17th of May was pronounced, interlocutory judgment had been signed in the cause. There was no copy of the pleadings filed on this application.

The plaintiff, *Crooks*, during the term moved the rule absolute, when *E. Crombie* showed cause, and contended that it was not regular to move to amend a judge's order without first applying to the judge who made it.

He objected that the declaration and pleadings in the cause were not filed, and there was nothing now before the court to bring the case within the statute, by shewing that the damages were substantially a mere matter of calculation.

That the order made by the judge was not to ascertain the amount for which final judgment was to be signed, but to ascertain and compute the amount due from defendant to plaintiff on the lease, and the interest. The claim for taxes was also in the declaration, and therefore the master could not with propriety enter judgment on the order.

There were, also, issues, in fact, on the record undisposed of, and final judgment could not properly be entered whilst that was the case.

In conclusion he contended that if any amendment was allowed, it should be on payment of costs by the plaintiff to the defendant. He referred to sec. 161 of Con. Stats. U. C. ch. 22. He also filed an affidavit stating that the plaintiff took issue on the defendant's plea filed in this cause, the defendant took issue on plaintiff's replication, and that the plaintiff took issue on the defendant's rejoinder to the plaintiff's replication; that the issues, in fact, and not been disposed of by trial of the same, or by a judge's order, or in any other way, unless the same should be held to be disposed of by the judgment of the court on the defendant's plea.

RICHARDS, C. J., delivered the judgment of the court.

It is to be regretted that the plaintiff finds so much difficulty in getting this suit brought to a satisfactory conclusion, after the court has pronounced upon the rights of the parties in relation to the subject matter of the suit. The difficulties that have arisen seem to have been occasioned by taking steps without due consideration as to what was required to be done by the practice of the court, and by not doing what ought to be done in the proper manner.

It is impossible for us now rightly to decide this application without reference to the pleadings. When the application was made, I supposed it was the intention of the plaintiff to file a copy of the pleading; and he seems to have intended to do so himself, for his rule is drawn up "on the grounds disclosed by the pleadings and orders in this cause, and the affidavit of the plaintiff's attorney filed." The orders and affidavit of the plaintiff's attorney were filed, but not the pleadings. The affidavits do not disclose

what the pleadings are; and though we may recollect something of them, because they or some part of them were once before us, they are not before us on this application; and that was taken as an objection on the argument, and the pleadings have not yet been produced to us, I think we are bound to give effect to the objection, and we must discharge the rule with costs.

There seems to be no difficulty in the plaintiff having the record put in proper shape, and having the proper amount, for which the judgment ought to be entered, ascertained on application to a judge in chambers. The sooner the application is made, the greater the probability of the plaintiff obtaining his judgment without delay; for should he be so unfortunate as to omit anything necessary in his next application, he may be able to put it right before the time expires for giving notice of assessment for the next assizes, and in this way he will have two opportunities of getting his damages ascertained.

Rule discharged with costs.

KERR ET AL. V. KINSEY.

Interpleader—Priority of Writs—Evidence—New trial.

Although the fact of a party not pressing a *pluries fi. fa.* in the sheriff's hands, coupled with the undoubted fact that he had placed the original writs there *not to be executed*, is evidence on which a jury may find that the later writ has also been delivered to the sheriff not to be acted on, and has therefore lost its priority as against a subsequent writ at the suit of another party; yet, the jury having found in favour of the execution, the court will not interfere with their verdict by granting a new trial, as it cannot be said that there was no evidence to support it.

This was an interpleader, to try whether the execution of the defendant Kinsey against one Mordecai Reynolds, issued out of this court, and delivered to the sheriff of the county of Oxford, was in the said sheriff's hands to be executed, and had priority over the execution of the plaintiffs' execution, which had been subsequently placed in the sheriff's hands against the goods of Reynolds.

The cause was tried before *Hagarty, J.*, at the last assizes held at Woodstock.

The jury found for the defendant.

The evidence shewed the following facts :

On the 20th of May, 1863, a *fi. fa.* against Reynolds' goods, directed to the sheriff of Oxford, had issued, commanding him to make the sum of £383 19s. 4d. damages and costs, and had been delivered to the sheriff on the following day, endorsed to levy £379 5s. debt, and £4 14s. 4d. costs, with interest, &c.

This writ was renewed on the 27th of May, 1864, for one year from that date.

On the 9th of April, 1864, a *fi. fa.* against goods had issued from the Court of Common Pleas, at the suit of Thos. C. Kerr and J. Brown, in their suit against Reynolds and one William Connell, to the sheriff of Oxford, to make £219 11s. 9d. damages and costs, and had been delivered to the sheriff on the 11th of April, 1864, endorsed to levy £211 18s. 2d. damages, and £7 23s. 7d. costs, with interest, &c.

On or about the 20th of May last, the sheriff seized under each of said writs certain goods of Reynolds at South Norwich consisting of horses, cattle, harness, farming implements, &c., which he advertised on that day for sale on the 31st of May following, describing them as seized under both writs, naming plaintiff's first. On that day he sold the goods, £131 of the proceeds of which sale he stated that he was ready to pay into court if required, to abide any order to be made by the court.

On such sale one George Haight, the plaintiffs' agent, became the purchaser, on the terms expressed in an agreement, a copy of which was as follows :—

“South Norwich, May 31st, 1864.

“I declare that I purchased from the sheriff of the county of Oxford, Andrew Ross, at the sale of Mordecai Reynolds' property, goods to the amount of \$484, which money I agree to pay to the said sheriff as soon as it is decided that Kinsey's execution has not priority over Kerr et al. v. Reynolds; and should priority be decided in favour of said Kinsey, the said sum of money, less sheriff's fees, to be applied on said Kinsey's execution.

“(Signed,) GEORGE HAIGHT.”

The agent of said Kerr & Brown was also present, and claimed the proceeds of the sale on the last-mentioned execution; and thereupon the sheriff took the said agreement, and all parties were aware of and did not object to the sale in that way, as it was understood that it should be so arranged, in order to settle the dispute as to priority.

No such arrangement was come to, and each party kept pressing the sheriff for a return, claiming the money, each one as his, and threatening the sheriff with an action.

Kerr and Brown claimed priority over Kinsey's writ, on the ground that it had lost its priority from the manner in which it had been issued, the sheriff having been told, when the first writ was received, not to execute it unless and until another writ should come in, and it was accordingly allowed to remain until it ran out, and then another writ (a *pluries fi. fa.*) was placed in the sheriff's hands. No instructions were given as to this writ, but the sheriff did nothing under it, *presuming* that his instructions as to the former were to be applied to this also. During the period it lay in the sheriff's office Kinsey never inquired about it.

The circumstances relating to Kinsey's dealing with the execution were as follows:—*On the 12th of April, 1860*, a writ in this cause issued to the former sheriff of the same county, indorsed for the debt and costs, &c., and was received by him by post on the 14th of April, with a letter from Kinsey's attorney, stating that he enclosed him a writ *for execution*, and that Kinsey would call upon him the following day, receipt the goods of Reynolds with him upon which the levy should be made, and make arrangements. Kinsey never did call and give instructions, and no levy was made, the sheriff supposing that none was to be made until Kinsey should call.

On the 13th of May, 1861, the writ was returned *nulla bona*, in accordance with instructions from Kinsey's attorney, as the time for renewal had elapsed, and he wished to issue an *alias*.

On the 20th of May, 1861, an *alias fi. fa.* was accordingly issued and placed in the sheriff's hands on the follow-

ing day, with a letter from the same attorney, merely stating that he enclosed an *alias fi. fa.* in the cause.

On the 1st of May, 1862, it was renewed for one year; and in the month of May, 1863, it was returned "expired;" and on the 28th of May, 1863, the writ in the same cause under which the sheriff seized was sent to him, with a letter from the same attorney merely stating that he enclosed him a *pluries fi. fa.* in the cause.

During last Easter Term, *M. O'Reilly, Q. C.*, obtained a rule *nisi* calling upon the defendant to show cause why the verdict should not be set aside and a new trial had between the parties, on the grounds that the verdict was contrary to law and evidence, and perverse, and contrary to the judge's charge; or that it was without evidence, or contrary to evidence, or contrary to the weight of evidence.

S. B. Freeman, Q. C., shewed cause.—Whether the defendant's writ was there to be executed was a question of fact for the jury, and was the only question in issue. The original writ may have been at one time in the sheriff's hands not to be executed unless some other writ came in; but the *pluries* writ was put into the sheriff's hands in the usual way, and there is no evidence to show it was there not to be executed. The verdict was not contrary to law, and there was evidence to sustain it.

O'Reilly, in support of the rule.—The whole conduct of the defendant, in reference to these writs, shews that they were in the sheriff's hands for the benefit of the defendant in the execution, and not with a view to be acted upon, unless some other execution came to the sheriff; for the defendant lay by, and did nothing till the plaintiff's writ was placed in the sheriff's hands. He cited *Hunt v. Hooper*, 12 M. & W. 664; *Bradley v. Windham*, 1 Wil. 44; *Castle v. Ruttan*, 4 C. P. 252; *Levick v. Crowder*, 8 B. & C. 132; *Bank of Montreal v. Munro*, 23 U. C. Q. B. 414; *Yates v. Smith*, 13 C. P. 572; *Rowe v. Jarvis*, 13 C. P. 495.

J. WILSON, J., delivered the judgment of the court.

The law has long been settled, that if a writ of execution be placed in the sheriff's hands not to be executed, it has no

place or priority against a subsequent execution placed in the sheriff's hands to be executed.

In this case, we think the evidence leaves little room to doubt that, in the first instance, the defendant's executions were placed in the sheriff's hands not to be executed; but that the last execution was so placed is by no means clear, unless we are to say that if a plaintiff have an execution on which he does not wish to press his debtor, and really so acts in reference to it that it loses its priority, he can never afterwards with another writ enforce it, as against another execution subsequent to his last one. Excepting that the defendant did not press his last execution, there is nothing to show it was placed in the sheriff's hands not to be executed; but the plaintiff contends that this, coupled with his conduct in reference to the former writs, is conclusive evidence against the defendant's right to priority. All we can say is, that it is evidence from which a jury might draw the conclusion for which the plaintiffs contend; and although we should have been better satisfied if the verdict had been for the plaintiffs, we cannot say there is no evidence for the finding as it is. Can we say that because the jury, leaning, as they are much inclined to do, in favour of him who has been the least pressing, that under the evidence before as they were wrong in their finding? If we cannot, then there is no authority, and no discretion that we can properly exercise in granting a new trial.

No doubt has been thrown upon the good faith of this judgment; for the plaintiffs did not question Reynolds, the execution debtor, whom they called, upon this point. He represented that he had borrowed money from the plaintiffs, but did not expect to be sued. He says he has paid the plaintiffs sums of money upon it: how much does not appear. The only question, therefore, was the one under discussion.

We think the rule must be discharged.

Rule discharged.

GLENNIE v. ROSS.

Unsatisfactory answers to interrogatories—Refusal to discharge defendant.

Where a defendant, in close custody under *ca. sa.* in an action of *crim con.*, has not satisfactorily answered interrogatories, and appears to have the means of satisfying a large portion of the judgment; he is neither entitled to be discharged under Con. Stats. U. C. cap. 26, sec. 8, nor to be re-committed under sec. 11 for a period of twelve months, and then discharged.

J. O'Connor obtained a rule *nisi* calling on the plaintiff to shew cause why the defendant should not be discharged from the custody of the sheriff of the united counties of York and Peel, and from the gaol of the city of Toronto, wherein he was in close custody under a writ of *capias ad satisfaciendum*, issued in this cause, and directed to the said sheriff, on the grounds that he was not worth the sum of twenty dollars, exclusive of his necessary wearing apparel, and that he had no other property, he, the said defendant, having submitted himself to be examined pursuant to the order of the learned Chief Justice of the Queen's Bench, and an appointment of the learned Judge of the County Court of the said united Counties of York and Peel; and upon grounds disclosed in affidavits and papers filed.

Robert A. Harrison shewed cause, citing Con. Stats. U. C. cap. 26, secs. 7, 8, 11; *Boyd v. Bartram*, 3 U. C. Pr. Rs. 28; *Clarkson v. Hart*, 9 U. C. Rs. 348; *Kirby v. Mitchell et al.*, 1 U. C. Cham. Rs. 137; *Leavens v. Ostrom*, *ib.* 261; *Wallis v. Harper*, 3 U. C. Pr. Rs. 50.

OC'onnor, contra.

J. WILSON, J., delivered the judgment of the court.

The defendant is a prisoner in close custody of the sheriff of the united counties of York and Peel, on a writ of *capias ad satisfaciendum*. He seeks to be discharged under the Con. Stats. U. C. cap. 26, sec. 8. Interrogatories have been put to him which he has answered, he contends, satisfactorily. It is objected that he has not done so; for he admits having very lately had a large sum of money, which, he says, was all stolen from him in a saloon in Buffalo, except \$14; but his expenditure immediately afterwards far exceeded \$14. The vague and unsatisfactory account he gives of the loss of this money, his apparent

unconcern about it, his previous threat that he would put himself in a position to be believed from his liability to the plaintiff's show, it is to be feared, that the loss was not real but pretended.

We think the answer of the defendants are not satisfactory, and that he now has the means under his control of satisfying a large proportion of the amount for which he is in custody.

As an alternative to recommitment indefinitely, we are asked to commit him for a period not exceeding twelve months, under the 11th section of the Act for the relief of Insolvent debtors. We think he does not come within the provisions of that action. It applies to those insolvent debtors who, having satisfactorily answered interrogatories, are nevertheless liable to be further imprisoned, if it appear that the debt was contracted by any manner of fraud or breach of trust, or under false pretences; or that such debtor wilfully contracted such debts, or incurred such liability, without having had at the same time a reasonable assurance of being able to pay or discharge the same, or that he is confined by reasons of a judgement in an action for breach of promise of marriage, seduction, criminal conversation, libel, or slander.

If the interrogatories had been satisfactorily answered he would have come under this section, for it appears that the judgment, under which the process issued against him, was recovered for criminal conversation with the plaintiff's wife.

As the matter stands at present, we see no course open other than to discharge the rule.

Rule discharged.

TURLEY v. WILLIAMSON (TENANT), JOHN JOHNSTON (LAND-LORD).

Limitation of actions—Con. Stat. U. C. ch. 88, secs. 1, 3

The *bringing of the action*, not the recovery of possession, stays the operation of the Statute of Limitations: therefore, where possession was taken under a *hab. fac. poss.*, though after a delay of ten years from the recovery of judgement,

Held, that the possession so taken related to the date of bringing the action, and that the intervening ten years possession would not enure to the benefit of the tenant, so as to assist him in claiming title under the statute.

Held, also, that a person going into possession under a deed from one who is supposed to be the heir of the grantee of the crown, but who is found by the jury not to have been the heir of the grantee, is not a person *claiming to hold under the grantee* within the meaning of sec. 3, so as to be relieved from showing that the grantee, or some one claiming under him, had notice of his possession.

This was an action of ejectment to recover possession of the east half of lot No. 6, in the 7th concession of the township of Murray.

The case was tried before A. WILSON, J., at the last assizes holden at Cobourg.

Lot 6 by letters patent of 30th June, 1801, had been granted to James Johnston, of Ameliasburgh. The plaintiff claimed the land through Daniel Johnston, of Ernestown, heir-at-law of James Johnston. The defendant claimed as heir-at-law of the patentee.

This Daniel Johnston, as heir-at-law of James Johnston, on the 18th September, 1822, conveyed the lot in question to Henry Ruttan, who conveyed the east half to Patrick McKenna, on the 21st August, 1834.

There was evidence that he was in possession of this lot in 1833, but Mr. Ruttan represented it as wild when he sold it.

McKenna and those claiming under him remained in possession from 1834 till 1863, when possession was delivered to the defendant Johnston by the sheriff, under an *alias writ of hab. fac. poss.* issued upon a judgment in ejectment recovered in 1852, in the case of *Johnston et al. v. McKenna*, and reported in 10 U. C. Q. B. 520. One of the questions, in this case, and it was the sole question in that, was whether Daniel Johnston, through whom the plaintiff claimed, or John Johnston, the defendant, was the heir-at-law of the

patentee. In both cases the jury found that the James Johnston, through whom the defendant in this action claimed, was the patentee.

At the trial it was contended for the plaintiff that he had made a good title by possession; for although the suit in which the defendant got possession was commenced in 1852, yet, possession not having been given under it within twenty years from the time the title accrued in 1833 or 1834, the statute ran and made the plaintiff's possessory title good. It was also contended, that, because McKenna had gone into possession, claiming under the grantee, the statute began to run in his favor from the time he took possession, and not from the time the defendant Johnson had knowledge of his being in possession.

The learned judge charged the jury that the statute began to run from the time the owner had notice that the land was occupied, and that the commencement of the suit of *Johnston v. McKenna* was the period at which the statute ceased to run.

The jury gave a verdict for defendant John Johnston.

In Easter Term *C. S. Patterson* obtained a rule *nisi*, calling on John Johnston to show cause why the verdict should not be set aside and a verdict entered for the plaintiff, pursuant to leave reserved, on the grounds that the plaintiff was entitled to claim by possession to the time of the execution of the writ of *hab. fac. poss.*, in the suit of *Johnston v. McKenna*, and not merely to the commencement of that suit; or on the ground of the bargain and sale of the land by the plaintiff's ancestor to Vanalstine; or why the said verdict should not be set aside and a new trial granted on the ground that the verdict was contrary to law and evidence, the plaintiff's title having been sufficiently proved; and for misdirection of the learned Judge who tried the cause in ruling that the twenty years possession in question must be prior to the commencement of the suit of *Johnston v. McKenna*, and that such possession could only be computed from the time when the plaintiff had notice thereof, notwithstanding the circumstances under which possession was taken.

In Michaelmas Term *J. D. Armour* shewed cause. He cited *Johnston v. McKenna*, 10 U. C. 520; *Wilkinson v. Kirby*, 15 C. B. 430; *Doe Perry v. Henderson*, 3 U. C. 486; *Doe Daniel v. Woodroffe*, 10 M. & W. 608; *Doe Day v. Bennett*, 21 U. C. 405; *Doe Grubb v. Grubb*, 5 B. & C. 457; *Ausman v. Minthorne*, 3 U. C. 423; *Doe Cuthberts v. McGillis*, 2 C. P. 124; *Butler v. Donaldson*, 12 U. C. 225; *Doe Taylor v. Proudfoot*, 9 U. C. 503; *Ketchum v. Wright*, 14 U. C. 99; *Pringle v. Allen*, 18 U. C. 575; *Wallis v. Hewitt*, 20 U. C. 108; *Smith v. Lloyd*, 9 Ex. 562; *McDonell v. Ginty*, 10 Ir. L. Rs. 514; *Cole on Eject.*, 68, 77; *Lord St. Leonard's Real Property*, last ed., p. 34.

C. S. Patterson, contra, referred to and commented upon the authorities already cited.

J. WILSON, J., delivered the judgment of the court.

We think the verdict is not contrary to law and evidence. The evidence well warranted the jury in finding that the James Johnston, who was the patentee, was the ancestor of the defendant. The direct and circumstantial evidence leads us to this conclusion, much more than that the ancestor of Daniel Johnston was the patentee.

We think there was no misdirection. The words of the statute are, "No person shall bring an action to recover land but within twenty years next after the time at which the right to bring such action shall have first accrued." Then the right to bring the action is declared to be the time of dispossession of him who had possession.

Is there any thing in these words to prevent the recovery of the lands if the suit be commenced within twenty years. But if the construction contended for by the plaintiff be correct, we should be obliged to read the statute as if the words were, no person shall *recover* lands but within twenty years, instead of "no person shall *bring an action* to recover lands." In *Doe Grubb v. Grubb*, (5 B. & C. 457,) the defendant died pending the suit. After his death the statute of limitations would have been a bar to a new action. The court gave the lessor of the plaintiff leave to sign judgment against the casual ejector in the old suit, unless

the heir at law of the deceased defendant would appear and defend as landlord. Why? To save the statute.

On the third section of the statute the plaintiff says, "I took possession of the land claiming under the grantee: my title by possession began then; for the exception is, 'in case some other person *not* claiming to hold under such grantee has been in possession of such land;' and it dose not apply to me." This appears plausible, but it is more ingenious than sound; for, as the fact was, he took possession of the land claiming it under one who was not the grantee of the crown, as the jury have found. Then the sole question is whether the commencement of the action in 1852 prevented the statute from running: if it did, the plaintiff had not then had twenty-years possession from his first entry upon it, nor had he possession from the time the defendant Johnston, or his ancestor, had knowledge of his possession.

We have already intimated our opinion that the commencement of the suit prevents the operation of the statute. But it was contended that the great delay in suing out the *alias* writ was to be considered. In what way, or on what principle, we cannot see. There was the judgment, which authorized the issuing of the writ. We cannot in this case extend or limit the plaintiff's right to his execution other than the law gives. If there was good cause why the writ should not have issued there was a proper time to show cause. If the writ was irregular it might in proper time have been set aside; but none of these considerations can avail the plaintiff here. We think the rule must be discharged.

Rule discharged.

HARRINGTON V. FALL.

Nisi Prius record—Amendment by judge at trial—Omission—Issue book—Irregularities—Amendment—Waiver—Attorney—Costs.

A party, if he desires to object to irregular or defective proceedings, must do so by making an immediate application to have them amended at the expense of him whose proceedings they are; for if he allow a fresh step to be taken in the cause without doing so, he will be held to have waived and cannot afterwards object to, the irregularities complained of.

Held, therefore, that it was no ground for setting aside a verdict that the issue book served upon the defendant was in several respects irregular and defective, and differed from the *nisi prius* record in many material vari-

ances and mistakes, for these should have been amended on the application of the defendant at the expense of the plaintiff, before he allowed the latter to enter the record, and not having objected to them in this way, he could not be heard to do so afterwards. But the plaintiff's attorney having conducted his proceedings with little care, the defendants rule, to set them aside, was discharged without costs.

In ejectment, a judge at *nisi prius* has power to amend the record by adding a *venire*, and inserting the dates in the notices annexed thereto.

In such an action it is no objection to the record, on the part of a defendant, that it omits the entry of judgment as to the undefended part of the land, provided it contain the issue raised by him.

This was an action of ejectment to recover possession of the north-east quarter of lot No. 8 in the 4th, and the south half of lot No. 5, in the fifth concession of the township of Murray.

The plaintiff claimed the land by virtue of a conveyance from Mary M. Huff, who was the heiress-at-law of James Fall (her son), who was the owner in fee.

The defendant Jones appeared and limited his defence to one acre of lot No. 5, in the 5th concession, of which he was in possession.

The defendants Fall and Psalter limited their defence to the north-east quarter of lot No. 8 in the 4th concession, and to the south-half of lot No. 5 in the 5th concession, except the acre in the possession of Jones, the other defendant.

The cause was carried down to trial at Cobourg, at the last spring assizes, before A. Wilson, J., when a verdict was rendered for the plaintiff.

When the record was entered for trial, the *venire* was not upon it, and the dates of the notices of defendants' claim were in blank. The attorneys and counsel of both parties were present in court. On the first day of the assizes, the plaintiff's attorney was about to fill in the dates on the record, when the defendants' counsel saw him and objected to it. The plaintiff's counsel asked the court for leave to put in the dates, to which the defendants' counsel objected; but the court granted him leave to do so. The dates, however, were not then filled in. Next day, when the jury were ready to be sworn, the dates were then added, by leave of the court. The leave was asked to add the *venire*, which the judge also granted, although the defendants' counsel opposed it; and the jury were sworn. The

defendants' counsel then declined to appear, and took no part in the trial.

Notice of trial, with issue books and notices, had been served on the defendants' attorney on the 8th, for the trial on the 17th of April; and in the meantime the defendants' attorney had asked the plaintiff's attorney to enter the cause low on the list, so that it should not be tried on the first day.

The issue book served with the notice of trial did not correspond with the record, nor were the notice of the defendants' claim copies of the notices attached to the record, nor did the record contain any entry of judgment by default for that part of the land not claimed by the defendants.

After the record had been entered, and the defendants' counsel had been that the issue book and notices did not correspond with the record and the notices attached to it, the attorney for the defendants served the plaintiff's attorney with notice protesting against his proceeding to trial, and informing him that if he did he would move to set all his proceedings aside for irregularity, with costs.

The plaintiff did proceed with the trial under this circumstances, and obtained a verdict.

In Easter term, *H. Cameron* obtained a rule *nisi*, calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had between the parties, with costs, for irregularity in the following respects:

1. That the proper issue books were served herein, with the proper notices herewith, and a proper *venue* thereto.

2. That the issue book served entirely different from the record, and contained many material variances and mistakes, and untruly alleged that judgement had been signed as to the parts of the property not defended for.

3. That no such judgment had been signed, and no judge's order for leave to sign the same obtained, and no complete issue as to all the property sued for had been joined, or appeared on the record.

4. That the record contained numerous errors, defects, and omissions, and was not a transcript of, nor did it agree with the issue book served, but differed therefrom in several

material particular, and that no notice of the defendants' title was annexed thereto, all which objections were disclosed in the affidavits and papers filed; and on the ground that the record was improperly altered and amended after its entry for trial, and that an amendment of it should not have been allowed at the time when made.

Or, why a new trial should not be granted on such terms as to the court should seem fit, on the ground that the plaintiff was not, on the law and evidence, entitled to recover; and that the defendants had a good defence to the action on the merits, as disclosed in the affidavits filed, and were not prepared to prove the same at the trial, owing to the irregularities of the record as aforesaid, and being taken by surprise by the amendment of the record as aforesaid.

As to merits, in moving the rule the defendants filed the affidavit of the attorney, that in his behalf the defendants has a good defence on the merits; and James McFall, one of the defendants, in her affidavit of merits, stated that Mary Magdalen Huff had frequently told her that she had been first married to a Frenchman whose name she, the deponent, had forgotten, and that Mary Magdalen Huff never knew what had become of him; that when she married Huff she did not know whether John Fall, her alleged husband, who had left her, was then dead, and that between the time said John Fall left her and her marriage with Huff she had married one Harvey, who had also left her, and she did not know what had become of him or of Fall, except that they ran away and did not return.

In Michaelmas Term *Francis* shewed cause. He filed an affidavit explaining that, when he went to pass the record, the gentleman acting for the deputy clerk of the crown declined to examine it with him, saying he should himself examine it, and that he supposed it had not been examined. He contended that the omissions in it were such as the court could give leave to amend, and that the amendments had been made with leave of the court; that the defendants were too late in serving notice not to proceed, for they had asked him to enter it low and he had entered it, which entry was a step in the cause which waived any irregularity. Besides, the defendants had appeared at the trial and opposed

the amendments, although they had declined to appear after the amendments had been permitted.

Then as to merits, he contended none were shewn; that Mary Magdalen Huff, spoken of by Jane Fall, was her mother-in-law, the mother of James Fall, who died on the land seised in fee, without issue; that she was a woman ninety-six years of age; that what she did after she had issue by Fall her husband, in regard to marrying could not affect her right to inherit her son's land. It was true she spoke of her having married a Frenchman before she married Fall, but her statement was too vague to bear the semblance of truth; that the affidavit disclosed no merits; that this old woman, the evidence shewed, bought this land herself for her son, and after his death sold it to the plaintiff. He cited *Boulton v. Jones*, 10 U. C. L. J. 46; *Cooze v. Newmengen*, 9 M. & W. 290; *Grimshawe v. White*, 12 C. P. 521; *Cuney et al. v. Bowker*, 9 Dowl. 523; *Harvey v. O'Meara*, 8 Dowl. 677; Arch. Pr. 10 ed. 289 & 290; *Ikin v. Plevin et al.* 5 Dowl. 594; *Harrold v. Stewart*, 10 U. C. L. J. 219, Harr. C. L. P. s. 291.

J. WILSON, J., delivered the judgment of the court.

On inspection, it appears that the issue book served is not a copy of the record, and that the notices served therewith are not copies of the notices now attached to it. As to the record, it contains no entry of the judgment for the undefended part, as the issue book does for in truth no judgment by default had been signed. But the entry of that default was upon the copy of the issue book served. When the defendants were served they knew, or ought to have known, whether judgment had been signed or not. If it had not, and its entry was material to them, they could have moved to amend the issue book at the plaintiff's expense.

We think it is enough for these defendants if the issue which they raise is put under the record: the omission of the entry of judgment as to the undefended part can in no way injure them, and can be no part of the issue to be tried.

As to the notices of the defendants claim: when copies of these notices were professed to have been served with the issue book, the defendants knew whether they were

correct or not, for they were, or ought to have been, copies of the notices they had given to the plaintiff. If they were not correct, the same rule applies; they ought to have had them amended at the expense of the plaintiff. If they were not the notices which were attached to the record, they could have had them amended at the trial. All or any of the numerous errors, defects and omissions, as they are now termed, could and ought to have been amended in the way suggested. It is too late after the plaintiff has been allowed to take the steps of entering his record, to object to his proceedings. *Ikin v. Plevin* is an authority as to what is proper to be done where the issue book is erroneous.

What was material to the plaintiff was amended by leave of the court, and it was open to the defendants to have their notices properly attached to the record if they had wished it. The authority of the judges to make the amendment is not questioned: sec. 222 of chap. 22 of C. L. P. A. His power to amend extends to ejectment cases as well, by the words of the statute as in *Blake et al. v. Done*, (7 H. & N. 464). And amendments are to be made as matter of right: *Bank of Montreal v. Reynolds et al.*, (24 U. C. Q. B. 381.)

The object of all legal proceedings is to determine with the least trouble and expense the matters really in dispute between the parties. There are rules to be observed in the conduct of these proceedings, but in which irregularities are constantly occurring. In reference to these irregularities one rule is prominent in the authorities cited, and in all the authorities upon the subject, that if one party discovers any irregularity in the proceedings of the other of sufficient moment to be noticed, he must promptly complain of it that it may be set right. If he does not, and allows the party who made it to advance one step further in the cause, he waives the irregularity and cannot afterwards complain of it. Here the defendants knew, or had the means of knowing of irregularities: instead of having them set right at the costs of the plaintiff they allowed him to proceed, and they must take the consequences.

We are asked for a new trial on the merits, and because the defendants were not prepared to prove their defence at the

trial owing to the irregularities in the record, and being taken by surprise by the amendment of the record.

We think the affidavits disclose no merits. The only facts, so crudely sworn to, namely, that Mary M. Huff, before her marriage with Fall, had been married to a Frenchman whose name was not remembered, might have shown that her son, through whom this plaintiff claims, was illegitimate. Her conduct afterwards can in no way affect this question. We should require not only to know who he was, but that he had married her, and was alive when she married Fall.

As to not being prepared to prove the defence, and being taken by surprise, we think the affidavit of the defendants' attorney furnishes the answer. He says: "I went to Cobourg on the first day of the Assizes, for which notice of trial herein had been served, and there retained counsel to defend this suit; but on his examining the record entered for trial and the issue book served with the notice of trial, *he advised* me that the same were so irregular and erroneous that the plaintiff could not properly proceed to trial or take a verdict herein; and in consequence of such advice I did not procure the attendance of all the witnesses for the defence, although the defendant Jane Fall and some of her witnesses attended on the day on which this cause was tried." If this be true there can have been no surprise: it rather points at the deliberate choice of the defendants to risk their case on a question of irregularity rather than on the merits, and we will not deprive them of their choice.

But the plaintiff's attorney seems to have conducted these proceedings with little care, and we cannot allow him to profit by his carelessness. The rule will be discharged without costs.

Rule discharged without costs.

STEPHENS v. BERRY.

Unstamped bill of Exchange—Time for affixing double stamp—Account stated—Evidence—Bill payable in American currency—Damages—White v. Baker, 1 V. K. 292 followed.

When a party becomes the holder of an unstamped bill of exchange he must, in order to make it valid in his hands, affix the double stamp to it *before* commencing an action upon it.

Per RICHARDS, C. J., that the holder of such a bill can only be considered safe by affixing the proper stamp at the time when in law he would be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter.

The view expressed in *Baxter v. Baynes*, 1 V.K. 237, as to the most convenient mode of raising the question of the invalidity of a bill for want of a stamp (*i. e.* by a special plea,) adhered to. In this case, however, as no objection had been taken at the trial to the absence of a special plea, and express leave had been given to enter a nonsuit, if the court should be of opinion that plaintiff was not entitled to recover on account of the bill not having been properly stamped in due time, and the case having been argued on that ground, the court did not consider it necessary to discuss the question as to the propriety of such ground of defence being set up under the plea of non-acceptance.

Held, also, that the bill of exchange was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor), as there was no privity between them; nor were certain letters which referred only to the bill, for if the latter was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated, because there would in any event be no legal or valid consideration for the promise.

White v. Baker, 1 V.K. 292, followed as to the damages, in the shape of exchange, to which the holder of a bill is entitled against the acceptor.

Quære, whether an instrument, purporting to be a bill of exchange, payable in New York "with current funds," if it mean other than lawful money of the United States, in a bill of exchange.

The first count of the declaration alleged that one William Young, on 11th January, 1865, by his bill of exchange, then overdue, directed to the defendant under the name and firm of E. Berry & Co., required the defendant to pay to his order the sum of fifteen thousand dollars in New York, with current funds, sixty days after date thereof; and defendant, under the name and style of E. Berry & Co., accepted the bill payable at the Bank of America, in New York, and the said William Young then endorsed and delivered the said bill to the Metropolitan Bank, or order, for account of the said plaintiff; and the said Metropolitan Bank then endorsed the same to the plaintiff; and the said bill was duly presented for payment thereof at the said Bank of America, in New York, and was dishonoured.

The declaration also contained the common counts for

money payable by the defendant to the plaintiff for goods bargained and sold by plaintiff to defendant ; for goods sold and delivered ; work, labour, and materials ; for money paid, money received by defendant to the use of plaintiff's for interest, and for money due on an account stated,

The defendant pleaded on 18th April, 1865.

1. That he did not accept the bill.
2. Plea to second count, never indebted.

On these pleas issue was joined.

The cause was taken down to trial at the last spring assizes for the county of Victoria, before Mr. Justice Adam Wilson.

The bill sued on was given in evidence. It was dated at Milwaukee, 11th of January, 1865, drawn by William Young on Messrs. E. Berry & Co., Kingston, C. W., payable to the order of the drawer, sixty days after date, for fifteen thousand dollars, in New York, with current funds. It was indorsed by the drawer, " Pay Metropolitan Bank, or order, for account of H. P. Stephens, Esq., or order," and by Romeo H. Stephens. On the face of the bill, it was accepted payable at Bank of America, New York, by E. Berry.

A letter from E. Berry & Co. to the plaintiff, dated 24th March, 1865, was also put in, stating they would substitute their draft on Jacques Tracy & Co., at three months date, to mature $\frac{1}{3}$, $\frac{15}{18}$ June, and $\frac{1}{3}$ July, for \$15,000 and interest on the whole, to be in place of Young's draft on them, held by the plaintiff. The notes were to carry interest at 7 per cent, from 15th of March, to be made in three equal amounts. Mr. Young's note was to be returned to him on the above notes being handed over to plaintiff. There was also another letter from E. Berry & Co. to plaintiff, dated, Kingston, 28th March, 1865, in which they acknowledged the receipt of plaintiff's letter of the 25th March, and said they had written Mr. Jacques that their proposal of the 24th March had not been accepted, and that they should not have occasion to trouble them. The letter proceeded, " We think we can make you a substantial payment as soon as navigation opens in May, and the remainder early in June, if that will suit you. We have at the moment no one whom we should like to ask to endorse for us, we never endorse ourselves for any one."

The plaintiff contended that these letters were evidence of an account stated between the parties, of a debt of \$15,000.

For defendant it was contended that the bill was drawn at Milwaukee, in the United States, upon defendant at Kingston, in Canada, payable to the city of New York; that at the time of the acceptance there were no stamps on the bill under our Prov. Stat. of 1864, and no stamps were placed on it until after the commencement of this action; that after the commencement of this suit, Canadian stamps to the amount of \$9, being double the amount required at the time of the acceptance, were placed on the bill when the plaintiff put his name on it as endorser, and *Sproule v. Legge*, 1 B. & C. 161, was referred to.

It was also urged that the money in the declaration must be presumed to be Canadian currency; but it was not so in fact, because when the bill was produced, it was shewn to be currency of the United States.

It was admitted that at the time the bill became due, on the 15th of March, 1865, if payable in current funds of the United States [as distinct from a gold value], the Canadian value of the bill was \$8,510 64; while if current funds were valued, as of the 6th of May, 1865, the day of the trial, the value of the bill in Canada funds would be \$10,628 88. The three following modes of stating the value and damages, if plaintiff was entitled to recover, were made up:

1. Considering the value	\$15,000 00
Interest, \$160; Protest, \$1 10.....	161 10
	<hr/>
	\$15,161 10
2. Value of American funds as Canada funds,	
on 15th of March, 1865	\$ 8,510 64
Interest, \$90 72; Protest, \$1 10	91 82
	<hr/>
	\$8, 602 46
3. Value in American funds as Canada funds,	
on the 6th May, the day of the trial.....	\$10,628 88
Interest, \$113 36; Protest, \$1 10	114 46
	<hr/>
	\$10,743 34

For the defendant it was contended that there was no evidence of an account stated.

It was agreed that a verdict should be entered for the plaintiff for \$8,602 46, with leave to move to increase it, on either or both of the counts of the declaration, to either of the other two sums above noted, if the court should think him entitled to a larger sum than that for which the verdict had been entered.

Leave was also given to the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover, because the bill was not stamped with Canadian stamps in due time to enable him to do so.

Defendant also had leave to move to enter a verdict for him on the account stated, and on the common counts, if the plaintiff retained his verdict on the first count. It was also admitted that the firm of Jacques, Tracey & Co., mentioned in the letters, resided and did business in Montreal.

In Easter Term last the defendant obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the ground that the bill of exchange offered in evidence, and the acceptance thereof, were invalid and of no effect for want of the necessary revenue stamps being affixed thereto ; or because such stamps were not affixed at such time, or by such person or persons, as would give validity to such bill or acceptance, or entitle the plaintiff to maintain his suit.

Or why, pursuant to such leave, a verdict should not be entered for the defendant upon the second issue joined, there having been no evidence to warrant a verdict for the plaintiff thereon. Or, why the verdict should not be set aside and a new trial had, because the same was contrary to the evidence, the declaration being upon a bill of exchange payable in lawful money of Canada, and the evidence being of a bill payable in money of a foreign country.

During the same Term the plaintiff also obtained a rule *nisi* to increase the verdict, pursuant to leave reserved, 1st. to the sum of \$15,162 10, on the ground that the plaintiff was entitled to the full amount, in lawful money of Canada, of the face of the bill in the declaration mentioned, being

\$15,000 with interest, or the equivalent, in lawful money of Canada, of the sum of \$15,000 in American money, having regard to the relative value of the Canadian and American dollar respectively; or, 2nd. to the sum of \$10,743 34, on the ground that the plaintiff was entitled to a verdict for an amount which would, on the day of the trial, have purchased a draft on New York for \$15,000 and interest, and such sum of \$10,743 34 being the requisite sum for such purpose.

Both these rules were enlarged until the present Term, and came to be argued together.

Anderson for the plaintiff,

The bill was drawn and is payable in the United States, though accepted in this Province. The 9th section of the Stamp Act provides, that any person in the Province who makes, draws, accepts, and indorses, signs, or becomes a party to any bill or note chargeable with duty, before the duty or double duty has been paid by affixing the proper stamp such person shall incur a penalty of \$100, and the instrument shall be invalid and of no effect in law or equity, and the acceptance shall be of no effect, except only in case of the payment of double duty; but that any subsequent party to such instrument may, *at the time of his becoming a party thereto*, pay such double duty by affixing to such instrument a stamp to the amount thereof, and by writing his signature or initials on such stamp, and the instrument shall thereby become valid. Here the plaintiff has affixed the double stamp to the bill, and the only question is, he has done so in the proper time? That depends on the time when he became a party to the bill. This he did when he endorsed it. The holder of a bill is not necessarily a party to it, and until he puts his name on it, or in some way signifies that he is a party to the bill, he ought not to be brought within the highly penal terms of the statute.

There is a letter admitting defendant's liability, and the verdict is on the common counts as well, and may stand for the plaintiff on these counts.

The face of the bill with interest is the proper measure of damages. It is payable in dollars, and we know of no difference between the American dollar and our own: it is

very trifling if there be any difference ; and, therefore, the amount of the bill in our own country is what it really represents. We cannot take notice of the fact, that in the United States something else than gold is receivable in payment of debts, which in fact reduces the standard of their currency, though the coinage is precisely the same as it was before. The action is against the acceptor, and the case of *Suse v. Pompe*, 8 C. B. N. S. 538, is only authority to shew that, as against the drawer or endorser of a bill, the damages are limited to exchange and expenses : *Chitty on Bills*, 412 ; *Dawson v. Morgan*, 9 B. & C. 618. But in an action by indorsee against acceptor, the liability is to pay the money mentioned in the bill with legal interest, according to the rate of the country where it is due.

As to the variance in not describing the bill as payable in lawful money of the United States, he applied to amend if necessary.

McLennan, contra.—The venue is laid in the County of Victoria in this Province, and the bill, according to the declaration, will be considered as made there, and the money mentioned in it will be considered as lawful money of Canada. *Kearney v. King*, 2 B. & Ald. 301, was an action against the defendant as acceptor of a bill of exchange. The declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, for certain sums therein mentioned, without alleging it to be Dublin in Ireland ; and it was held, that, on this declaration, the bill must be taken to have been drawn in England for English money, and, therefore, proof of a bill drawn at Dublin in Ireland for the same sum in Irish money, which differs in value from English money, did not support the declaration, and was a fatal variance. In *Sproule v. Legge*, 1 B. & C. 16, the declaration stated that plaintiff, at Dublin, made a promissory note, and promised to pay the same at Dublin, without alleging it to be Dublin in Ireland, where also it was held that the promissory note must be taken to have been drawn in England for English money, and proof of a note made in Ireland for the same sum in Irish money did not support the declaration. Reference is also directed to *Chitty on Bills*, 397.

The stamps not having been put on the bill until after the commencement of the action, plaintiff must fail: the plaintiff's rights have reference to the time of bringing the action, and if the bill was not a good bill then, it cannot be now. If the plaintiff was not a party to the bill, he could not bring an action on it; and if, having brought his action, he then became a party to the bill, he did not even then stamp it, and it is therefore void. According to defendant's argument, the holder of a bill, who has never indorsed it away, can always avoid the forfeiture by putting on the double stamp and writing his name on it, even at the trial. This would in fact render the act of Parliament of little use; for frauds would constantly be practiced to avoid it. *Baxter v. Baynes*, 1 V.K. (15 C. P.) 245, is referred to as to the effect of the stamp act.

As to the account stated, the contract arising from the account stated is a contract to pay on request or demand, whilst the agreement to pay by defendant's letters is in a particular way.

No contract arises on the account stated from plaintiff being the holder of the bill, as there is no privity between him and the acceptor: *Early v. Bowman*, 1 B. & Ad. 889; *Calvert v. Baker*, 4 M. & W. 417; *Barmester et al. v. Hogarth*, 11 M. & W. 97; *White v. Baker*, 1 V.K. (15 C.P.) 292; Story on Conflict of Laws, secs. 286, 309; *Wood v. Young*, 14 U. C. C. P. 250; Chitty on Bills, 9 ed. 582, 583, 685, 686.

If plaintiff can sustain the action, all he is entitled to recover is the value of the American money the day the contract was to be performed, with interest. He referred also to *Suse v. Pompe*.

RICHARDS, C. J., delivered the judgment of the court.

The first question to be considered is whether the plaintiff is a party to the bill sued on, and when he became such party. As a general rule, no person can sue on a bill of exchange or promissory note unless he is a party to it. The expressions run constantly through the cases, "He cannot sue on the bill; he is no party to it."

In Chitty on Bills, 9 ed. p. 27, it is stated, "The drawer,

acceptor, indorser, and *holder*, are the principal and intermediate parties in the instrument." In the declaration the plaintiff avers that Young endorsed and delivered the bill to the Metropolitan Bank, who endorsed the same to the plaintiff. Now all this must have been done before the plaintiff could sue on the bill. It is true some of the authorities shew that if the bill, when the action was commenced, was in the hands of a third person, as agent or trustee for the plaintiff, he might sue, though the bill was not then in his actual possession. In all these cases, I apprehend, the person suing has been a party to the bill at some time before the bringing of the action. For the purpose of our stamp act, I think we are certainly bound to decide, that when a person becomes the holder of an unstamped bill, so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp, when the bill without it would be void. The holder, in my judgment, can only be considered safe when he puts on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter. We are, therefore, of opinion that, on the first ground of nonsuit, our judgment must be in favour of the defendant.

In coming to this conclusion, I may observe that I still retain the view expressed in *Baxter v. Baynes*, that the most convenient way to raise the question as to the invalidity of a bill for want of a stamp is by a special plea; but as no objection was taken at the trial to the want of a special plea, and express leave was given to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover for want of the bill being properly stamped in due time, and the case was argued before us on that ground, we do not think it necessary in this case further to discuss the question as to this ground of defence being set up under the plea, that the defendant did not accept the bill.

The bill is not evidence of an account stated as between these parties, for there is no privity between the acceptor and the indorsee. The only evidence is the letters produced

at the trial, and these only refer to the bill which is the subject of the action. If that bill is void and of no effect, an acknowledgment of it, and a promise to pay in a particular way, can raise no promise to pay on the account stated, for there would in any event be no legal or valid consideration for the promise stated. The doctrine is laid down in some of the older cases, though not expressly in relation to the particular point now under discussion, "the accompt doth not alter the nature of the debt, but only reduceth it to certainty : " *Drue v. Thorn* (Aleyn. 73).

As to the question of damages, *Suse v. Pompe* is an authority that the amount for which the jury assessed damages, is the amount which could be recovered against the drawer or indorser of the bill ; and some of the authorities seem to sanction the view, that larger damages may be recovered by the holder against drawer and indorser, than against the acceptor ; the acceptor not being considered liable for re-exchange, as his contract is only to pay the sum specified in the bill and legal interest, according to the rate of the country where it is due. The amount found for the plaintiff accords with the views expressed in *White v. Baker*, decided in this court, and is quite as favourable to the plaintiff as the authorities would seem to warrant.

In argument it was suggested, that the value of the American currency, as compared with our own, at the time of the trial, was the true measure of damages for the plaintiff, or that the plaintiff might select any day between the breach of defendant's contract to pay and the assessing of the damages, as the one on which the rate of exchange should be fixed. Independent of the invariable doctrine in England, that interest is the only damages that can be given for the detaining of money after the day on which it is due, the authorities, particularly in England, in the case of an ordinary breach of contract, when the party suing has paid all the money, decide that the damages are to be considered by placing the plaintiff in the position he would have been in, if the defendant had carried out his contract ; and the value of the commodity to be delivered is to be estimated at what it was worth at that time. There seems to be one exception to this rule : when stocks are borrowed to be re-

turned by a certain day, the jury should give such damages as will indemnify the plaintiff, and, when the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial: *Owen v. Routh*, (14 C. B. 327, and American notes to that case.)

There was nothing said in the argument as to this bill being payable in New York with current funds. If that means anything different from lawful money of the United States, then it may be a question if the instrument is a bill of exchange at all; and if it is not legally a bill of exchange, plaintiff can have no property in it.

The rule to increase the damages will be discharged, and the defendant's rule to enter a nonsuit made absolute.

Rule absolute to enter nonsuit, rule to increase damages discharged.

OGILVIE v. MCRORY.

Adding parties at trial—Con. Stat. U. C. ch. 22, sec. 222—*Authority of guardian to consent to infants being added*—Con. Stat. U. C. ch. 74, sec. 5.

Held, on the authority of *Clake v. Done*, 7 H. & N. 465, that the judge at *nisi prius* his power, under sec. 222, Con. Stats. U. C. c. 22 to amend by adding parties, where such amendment is necessary for the purpose of determining the real question in controversy.

Held, also that the guardian of an infant, appointed under Con. Stats. U. C. ch. 74, had authority, under sec. 5 of that act, to consent to the name of the infant being so added in a suit which seems to be for the latter benefit.

Quare, whether such consent be in writing. In this case, the point not having been raised at the trial, the court refused to entertain the objection.

This was an action of ejectment to recover possession of the west half of lot No. 4, in the last concession of Fenelon, in the County of Victoria, to the possession whereof Hugh Ogilvie and Charles Ganton, the latter as guardian to Elizabeth Ogilvie, Henrietta Ogilvie, Daniel Ogilvie, Esther Ogilvie, Caleb Ogilvie, Clarissa Ogilvie, Charlotte Ogilvie, Wm. Francis Ogilvie, and Charles Henry Ogilvie, infants within the age of twenty-one years, claimed to be entitled. The writ in ejectment was directed to Jane McRory, administratrix of David McRory, and was tested 2nd March, 1865.

On the 12th April, 1865, Jane McRory, administratrix of

David McRory, deceased, appeared to the said writ and defendant for the whole of the land therein mentioned.

In the notice of claim, in the style of the cause, the plaintiffs, names were put as they were in the writ, but the notice itself stated that the above named plaintiff, Hugh Ogilvie, claimed possession of the lands and premises mentioned and described in the writ, by descent from Francis Ogilvie, and Charles Granton, the above named plaintiff, as guardian for Elizabeth Ogilvie, Henrietta Ogilvie, &c., named the others as in the writ, infants under the age of twenty-one years, who claimed possession thereof by descent from the said Francis Ogilvie, who was seised of an estate in fee simple therein under a deed of bargain and sale made by David McRory to the said Francis Ogilvie, deceased. In the notice of defence the defendant, besides denying the title to the above named plaintiffs to the lands and premises mentioned in the writ, asserted title in herself, as tenant of the heir-at-law of David McRory.

The cause was taken down for trial at the last assizes for the county of Victoria, before Mr. Justice Adam Wilson.

A deed from David McRory to Francis Ogilvie, dated 15th August, 1859, was put in and admitted.

The death of Francis Ogilvie, in June, 1863, was proved. that Hugh Ogilvie was his eldest child, and that all the children were under age except Hugh. All the other plaintiffs were proved to be children of Francis Ogilvie, except Elizabeth, whose name must have been omitted by accident. Letters of guardianship from the Surrogate Court of the County of Victoria were put in: they were dated 5th day of January, 1864, and by these Granton was appointed guardian of all the children.

At the close of the plaintiffs' case it was objected, that there was no title shewn in Granton as guardian, the Con. Stat. U. C. ch. 74, sec. 5 shewing that the action should have been brought in the same of the words.

The plaintiffs' counsel contended that the notice of title being by Hugh Ogilvie, and by Granton as guardian, was in effect a claim by the infants through their guardian, and that that was right; but if not, he moved to add the names of the infants as claimants in the writ. He further con-

tended that Hugh Ogilvie, being entitled to an undivided one-tenth as tenant in common, defendant would not resist his right to the whole, because she was not a tenant in common, but a stranger.

The learned Judge ruled against the plaintiff on the last point, but allowed the amendment.

C. S. Patterson opposed the amendment, because, though the deed was absolute on its face, it in reality was a mortgage, and defendant had filed a bill to redeem, and plaintiffs should not be aided to recover the possession; and that the Judge had not the power to make the amendment.

The learned Judge allowed the amendment.

The plaintiffs' counsel said he was willing to take the verdict for the plaintiffs on the record, as it stood, without amendment, the defendant having leave to move against the verdict as to the nine-tenths, or to enter it for him, if the court should be of opinion that he was so entitled as the record then stood, unless the court should think the learned Judge had power to amend the record as prayed for, and should have made it, in which latter case the verdict should stand. The verdict was accordingly entered for the plaintiffs generally.

In Easter Term last *C. S. Patterson*, for the defendant, obtained a rule *nisi* to enter a verdict for the defendant as to all the land claimed except the undivided one-tenth: or that the verdict should be entered for the plaintiff, Hugh Ogilvie, alone, for the undivided one-tenth part of the land claimed pursuant to leave reserved, on the ground that the plaintiff Ganton had no legal title, and the plaintiff Ogilvie was only entitled to the undivided one-tenth share.

The rule was enlarged until the present term, when *M. C. Cameron*, Q. C., shewed cause.—

The notice of claim is not open to the objection taken, as it sufficiently shews that the infants claim by Ganton as their guardian; and that they claim possession by descent from their father.

The writ may be amended either under the Ejectment Act, cap. 27, sec. 77, of Con. Stat. U. C., in the same way as a new demise might have been added according to the old practice, or under sec. 222 of cap. 22 of same statute,

the Common Law Procedure Act. If it was necessary for the guardian to give consent, he was at the trial and could do so; and if it was necessary to get the consent of the infants to add their names, the guardian was the proper person to give the consent; Con. Stat. U. C. cap. 74, sec. 5; *Blake et al. v. Done*, 7 H. & N. 465; *Beaumont v. Armitage*, 1 D. & R. 173.

C. S. Patterson, contra.—The amendment desired was the adding of the plaintiff's name, and sec. 65 of the Common Law Procedure Act applies, which requires the consent, either in person or in writing, of the persons whose names are to be added. There was no written consent had, therefore the names cannot be added.

The 222nd sec. of the Common Law Procedure Act does not apply, the adding of parties having been provided for under the former sections of the act. *Blake v. Done* shews that the parties whose names were added were in court, and consented to their names being used as plaintiffs in the action.

RICHARDS, C. J., delivered the judgment of the court.

We are of opinion that this rule should be discharged. The understanding at the trial seems to have been, if the court was of opinion that the judge at *Nisi Prius* had power to make the amendment, and it was a proper exercise of his discretion to do so, then the verdict should not be interfered with. *Blake v. Done* is express authority that the judge at *nisi prius* may amend, by adding parties under the 222nd section of the English Common Law Procedure Act. That section is the same as the section of the same number in our own Common Law Procedure Act, and seems to authorise the amendment of defects and errors "in any proceeding in civil cases:" and declares "that all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." There can be little doubt that the real question is controversy in this suit, was the right of the heirs of Francis Ogilvie to recover possession of the land in the summons. The notice of claim, as well as the evidence at the trial, shew this; and in that view the

amendment was one proper to be made. As a matter of authority, the judgment of the court in the case referred to in the Exchequer is express on the point.

Then as to the consent of the parties that their names should be added as plaintiffs. All the infants were not present at the trial, but the guardian was; and the 5th section of Con. Stats. U. C. ch. 74, authorises the guardian of an infant appointed under that act, during the continuance of his guardianship, to appear in any court and prosecute or defend any action in the name of the infant. I think this authorises the guardian to consent to the name of the infant being added in a suit, in a manner which seems to be for the benefit of the infant.

The question of a written consent, if that was necessary, does not seem to have been raised at the trial. It was stated on the argument that the guardian was at the trial and could have given his consent, if it had been made a point of there; but as it was not then suggested as an objection, it cannot well properly be raised now.

If the plaintiff is desirous of amending the record, by adding the names of the infants as plaintiffs, I think on the understanding come to at the trial that may, and, probably, for the sake of regularity ought to be done now.

The defendant's rule will be discharged.

Rule discharged.

MCCALLUM V. MCKINNON.

Action on award—Pleading.

The declaration, after reciting that certain differences had arisen between the plaintiff and the testator of the defendant, and that the said testator had entered into an arbitration bond with plaintiff to submit to the award of certain parties therein named the matters in difference so existing between them, several of which were set out; and that the said parties, having undertaken the said arbitration, had made and published their award in writing in the lifetime of the said testator, and had awarded that said testator should pay plaintiff by a certain day the sum of £100;—then averred that the said testator had not in his lifetime, nor had the defendant since his death, as his executrix, paid to plaintiff the said £100 so awarded to plaintiff, or any part thereof.

Held, on demurrer, declaration good; for the action appearing to be on the *award*, and not on the *bond to perform the award*, it was not necessary to set out the whole award, but only so much as would support the plaintiff's case.

Form of declaration on bond conditioned to perform an award.

Declaration.—That, in the lifetime of said John McKinnon, certain differences having arisen and being depending between the plaintiff and the said John McKinnon, the said John McKinnon, by a certain bond of arbitration, bearing date the 13th day of April, in the year of our Lord 1862, became bound to the plaintiff in a certain sum of money in said bond mentioned, which bond conditioned to submit to the decision and award of John Church Hyde, of the village of Streetsville, in the county of Peel, and province of Canada; Henry Winter, of the town of Milton, in the county of Halton, and province of Canada; and Peter Archibald McDougald, of the town of Oakville, in the county of Halton aforesaid, parties named, selected, and chosen arbitrators as well by and on the part and behalf of the said John McKinnon, as of the said Neil McCallum, to arbitrate, award, order, judge, and determine of and concerning a certain judgment had and obtained in the Court of Queen's Bench, on the 2nd day of April, 1862, against the said John McKinnon, in favour of the said Neil McCallum, under what conditions the said Neil McCallum and the said John McKinnon should be relieved of their obligations, under the agreement in writing, concerning the purchase and sale of the north-west half of lot No. 2, in the second concession north of Dundas street, in the old survey of the township of Trafalgar, in the county of Halton aforesaid, made and entered into by the said John McKinnon and Neil McCallum, on the 24th day of April, 1857. Also, that the said arbitrators should determine on what condition the said John McKinnon should convey to the said Neil McCallum lot No. 21, in the 2nd concession, east of the plank road, in the township of Oneida, in the county of Haldimand, containing about one hundred and seventy-one and a half acres, reserving the possession of one acre thereof, then occupied by one Anne Chadwick, for the term of ten years from the date of said bond; and also, that said arbitrators should award and determine as well all manner of actions, cause and causes of action, suits, controversies, claims and demands, then pending, existing, or held by and between the said John McKinnon and the said Neil McCallum, thereby consenting that the said reference might

be made a rule of Her Majesty's Court of Queen's Bench ; and also that the said award should be made in writing, under the hands and seals of the said John Church Hyde, Henry Winter, and Peter Archibald McDougald, or any two of them, and ready to be delivered to the said parties, or such of them as should desire the same, on or before the 22nd day of May next after the date of the said bond. And further, that the said John Church Hyde, Henry Winter, and Peter Archibald McDougald, in the lifetime of the said John McKinnon, having taken upon themselves the burden of the said arbitrations, did in due manner and within the time for that purpose limited, and in the lifetime of the said John McKinnon, to wit, on the 30th day of April, 1862, duly make and publish their award in writing of and concerning the said matters in difference between the parties, ready to be delivered to the parties ; and they did thereby find that the said John McKinnon should pay or cause to be paid to the said plaintiff, on or before the 1st day of November then next ensuing, with interest at 6 per cent. per annum, the sum of £100 ; yet the said John McKinnon did not in his lifetime, nor did the defendant since his death, as such executrix, pay to the plaintiff the said sum of £100 awarded as aforesaid, or any part thereof, or the said interest, or any part thereof.

Demurrer.—1st. That the action, being debt on an arbitration bond, assigning breaches, the declaration should set out the whole award, and assumed so to do ; yet, if so set out, it appeared that all the matters submitted by the parties to the arbitrators were not decided by the said award ; for it did not appear that the said award defined the conditions on which the plaintiff and the said John McKinnon should be released from their obligations under the agreement respecting the Trafalgar land in the declaration referred to ; or that the arbitrators determined the conditions on which the said John McKinnon should convey the Oneida land in the said declaration mentioned to the plaintiff ; nor did it appear whether these and other matters submitted were at all considered or determined by the arbitrators, or for what cause the £100 sued for was awarded to

the plaintiff; and that the said declaration, therefore, did not set out any valid award.

2nd. That if the whole award was not set out, then the declaration, being on an arbitration bond, was objectionable and bad for not having so set out the award, or sufficient thereof to shew a good and valid award under the submission between the parties.

Robert A. Harrison, for the demurrer, cited *In re Rider and Fisher*, 3 Bing. N. C. 884; *Richards v. Browne*, 8 Ir. C. L. 199; *Bowen v. Samis*, 2 U. C. Pr. R. 76.

McMichael, contra, cited *Perry v. Nicholson*, 1 Burr. 278; *Foreland v. Marygold*, 1 Salk. 72.

RICHARDS, C. J., delivered the judgment of the court.

I am of opinion there must be judgment for the plaintiff on this demurrer.

The action seems to be brought on the award, and the reference to the arbitration bond seems a mere matter of recital, to show the arbitrator had authority to make the award. The form of the declaration appears to be similar to that given in the 7th edition of Chitty on Pleading, in actions on awards, as well as in Russell on Awards, in the Appendix.

If the action be on the award, then the demurrer is clearly bad. In William Saunders, vol. 2, p. 62, c., it is laid down, in 1 Sid. 161, *Tilford v. French*, it was said and agreed to by Twysden, J., that if debt be brought upon an award for money generally, without shewing the award on both sides, the action is maintainable. And in *Foreland v. Marygold*, (1 Salk. 72) it was agreed that, in debt on award, plaintiff need not set forth more of the award than makes for him. So in *Perry v. Nicholson* (1 Burr. 280) it is said, nothing is clearer than that, in an action of debt upon an award, a man has no need to state in his declaration any more of the award than supports his cause. If there be anything by way of condition precedent to the payment of the money, he may set it out in pleading.

In an action of debt on bond to perform an award, it seems necessary to set forth the whole of the award either in the declaration or the replication.

The form of declaration on bond, conditioned for the

performance of an award, is to set out the bond, and if it is intended to assign breaches in the declaration, to recite the condition, then state the award and assign the breaches.

This declaration seems to be on the award rather than on the bond, and, therefore, under the authorities, our judgment must be for the plaintiff.

Judgment for plaintiff on demurrer.

NOLAN V. FOX.

Deed to married woman—Possession and conveyance by husband—Livery of seisin—Evidence—Demand of possession—Ambiguity—Evidence—Estate in futuro.

A grant to a married woman of a life estate in land does not require the assent of her husband in order to pass the title to her; and unless he repudiate it in some way, both will be seised in her right of the estate so granted.

Possession is evidence of livery of seisin of land; and, where there is evidence of possession accompanying and following a deed for upwards of thirty years, seisin may well be presumed.

A demand of possession is not necessary in ejectment, where the estate of the defendant has terminated by reason of the death of his grantor, the husband of the lessee for life.

Though a man has been in possession for twenty years of land granted to his wife for life, he does not thereby acquire an absolute title to the land; for he is merely seised with her, by operation of law, of her estate therein, and any grant made by him will only pass an estate for his own life, *if his wife should so long live*; and if he predecease her, the right to possession will revert to her, and entitle her to maintain ejectment against his grantee.

The modern doctrine in interpreting the meaning of a grant or other instrument is, to ascertain the surrounding facts at the time the same was made. In this case, which was ejectment for a part of Lot 41, in the 1st concession of the township of Colchester, the patentee of the whole lot granted to the plaintiff "all that parcel of land commonly known by part of lot No. 41, containing fifty acres," describing it by boundaries which corresponded with the fifty acres off the rear part of the lot on which, it was proved, *he lived at the date of the deed*, being, also, himself described in the deed as of *the same place*. The grantee with her husband thereupon went into possession of the land, being that in question in the cause; and there was no evidence that the grantor owned any other Lot 41.

Held, that the words in the deed, with the surrounding facts, together with what followed immediately after its execution, were sufficient to show with reasonable certainty that the land sued for passed by the grant; and that evidence of such facts was properly received at the trial.

In this case, also, the deed was dated the 27th of March, 1824, to hold from the 30th day of the same month.

Held, that though, under the authorities, it might, if executed and livery of seisin not given on the day it bore date, be void, yet if not executed or livery of seisin given until after the day on which it was to begin to operate, it would be good; and,

Semble, that the jury might properly have been asked, under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed.

This was an action of ejectment to recover part of lot No. 41, in the 1st concession of the township of Colchester, in the county of Essex, containing fifty acres. The boundaries were stated in the writ, which was dated the 18th July, 1865.

On the 30th March, 1865, Solomon Fox appeared and defended for the whole of the land in the declaration mentioned.

The plaintiff, in her notice of title, claimed possession of the land by virtue of a lease, by deed, made by John Snider to her for life, as the wife of Henry Nolan, the said Snider then being the patentee of the crown.

The defendant, besides denying the claimant's title, asserted title in himself, as the grantee of Henry Nolan, who claimed the land and premises in question by length of possession.

The cause was taken down to trial at the last Spring Assizes for the county of Essex, before Mr. Justice John Wilson, when a verdict was rendered for the plaintiff.

It was admitted that John Snider was the patentee of the lot of land, the whole two hundred acres, part of which was in dispute.

The deed or lease from Snider to plaintiff was admitted. Those parts of the instrument necessary to be referred to were in substance as follows :

“ This indenture, made at Colchester, in the county of Essex, province of Upper Canada, this 27th day of March, A.D. 1824, between John Snider, of Colchester, yeoman, of the one part, and Hannah Snider, wife of Henry Nolan, of the same place of the other part : Witnesseth, that the said John Snider, for and in consideration of the yearly rent of one peck of corn hereinafter mentioned and contained, which, on the part and behalf of her the said Hannah Snider, her executors, administrators, and assigns, are or ought to be paid, kept, done and performed, hath demised, granted, and let, and by these presents doth demise, grant, and let unto the said Hannah Snider, her

executors, administrators, and assigns, all that lot or parcel of land commonly known by part of lot number forty-one, containing fifty acres, butted and bounded as follows, that is to say, commencing in front in the rear of one hundred and fifty acres of said lot, at the south-east angle; then norte forty-three chains seventy-five links; then west eleven chains forty-six links, more or less, to the limit between lots numbers forty-one and forty-two; then south forty-three chains seventy-five links, more or less, to the said rear to the place of beginning: To have and to hold the said parcel or tract of land * * * with the appurtenances, unto the said Hannah Snider, her executors, administrators, and assigns, from the *thirtieth day of the present month of March* until the day of her decease; after that to her husband, Henry Nolan, if he should survive her, to the day of his death: yielding and paying therefore yearly one peck of corn, commencing one year after this date."

Then following a covenant by Hannah Snider, that she would pay the rent yearly according to the lease, and that no other person or persons should at any time have permission from or under her to rent the said premises.

"In witness whereof the parties thereto set their hands and seals, at Colchester, in the county of Essex, the day and years first above written."

The instrument was registred in the registry office of the county of Essex.

The death of Henry Nolan was proved to have occurred in April, 1864. It was also proved that John Snider resided on the lot to about February, 1826, when he exchanged the front 150 acres with one Fox, his grandson, for another lot. Before this he had made the lease to plaintiff, and Nolan was then living on the lot. There was evidence to go to the jury of conversations between Nolan and John Snider, from which it could reasonably be inferred that Nolan was occupying the land under the instrument that Snider had given; though the witness at one time used the word "lease," and afterwards was not certain that that word was used by Nolan. When intoxicated, Nolan frequently threatened to sell his right to the lot. Snider has said that he gave him the lease to try to settle him, but he

was worse now than before. It was when he was threatening to sell his rights to the lot these conversations occurred. The witness said he (Nolan) had no right to the lot but the lease. Another witness, who had taken a lease from Nolan of the land, said he (Nolan) claimed it under a lease. After the lease, Nolan and his wife lived on the 50 acres as man and wife, and he voted at elections on it. Nolan had no other land there to the knowledge of the witness. Nolan and his wife parted over thirty years before the bringing of the action.

For the defendant it was objected :

1. There was no assent of Nolan to the accepting of the lease.

2. No livery of seisin shewn.

3. No evidence that Nolan entered under the lease ; the evidence being that, if he entered under any lease, it was a lease to himself.

4. No evidence of lease applicable to the land in question.

5. The lease did not describe the land.

6. Evidence to supply the want of descriptions should not have been received.

7. The evidence given did not shew the description sufficiently certain to make the deed good.

8. No demand of possession before action brought.

9. No evidence of any payment of rent to Snider or his heirs.

10. The wife was incapable of taking a lease.

Leave was given to the defendant to move to enter a nonsuit on any of these grounds.

The deed from Nolan the plaintiff was admitted.

The learned judge left it to the jury to say : 1. Whether Nolan went into possession under this lease. 2. Whether the land in question was the land understood to be leased to Nolan's wife, and if so, to find for plaintiff. But if Nolan held the land in his own right for 21 years, and not under the lease, then to find for defendants. He told the jury they might presume the rent was paid until the contrary appeared. This was objected to.

He told the jury that parol evidence was admissible to prove that land was intended to be demised, which could

not be done in the case of a conveyance. This, also, was objected to; and it was urged that if the instrument created a freehold, it was a conveyance of land, and the land was not sufficiently described.

Neither plaintiff's nor defendant's counsel made a point that the *habendum* was to hold from the 30th of March, while the instrument was dated the 27th of March.

The jury found a verdict for the plaintiff.

In Easter Term last, *J. O'Connor* obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, and on the objections taken at the trial; and on the further ground that the deed, under which the plaintiff claimed, was void, because it was to operate *in futuro*; or why a new trial should not be had, costs to abide the events, the verdict being contrary to law and evidence and the weight of evidence, on the following grounds:

1. A title by length of possession was clearly shewn in defendant and Nolan, his grantor.

2. That Nolan was not a party to the deed from Snider to plaintiff: he never affirmed the same or assented thereto, nor had any knowledge thereof.

3. It was not shewn that Nolan entered under the deed; on the contrary, he claimed and held in his own right.

4. The deed was void: 1. Because it was uncertain for want of a valid description of the property intended to be conveyed. 2. Because it was made to commence *in futuro*.

3. Because it was not perfected by livery of seisin.

5. And for misdirection of the learned judge, in leaving it to the jury to say: 1. Whether Nolan had entered under the deed or not. 2. Whether the land in question was not the land comprised in the deed; and, 3. For telling them that payment of rent should be presumed until non-payment was proved; and for saying to the jury that the description of property in a lease, alluding to the instrument under which the plaintiff claimed, need not be as accurate as in a deed; and for the reception of improper evidence, viz., evidence to supply the defect in the description of the property contained in the deed.

The rule was enlarged until the present term, when *J. G. Scott* shewed cause.—The instrument, on the face of it, is made in the township of Colchester. Lot No. 41 is referred to, and the reasonable intendment is, that it is in the township of Colchester, particularly as the grantor is described of that township. The parol evidence was merely to shew that the lot set out in the summons was the Lot 41 in Colchester, and that Snider resided on and owned it at that time. The rule of law is to make the deed operative if possible, and not to hold it bad, if that can be avoided: *Cruise's Digest*, vol. iv. p. 255, sec. 60, "deed;" *Hutchins v. Scott*, 2 M. & W. 809; *Goodtitle v. Southern*, 1 M. & S. 299; *Beaumont v. Field*, 1 B. & Ald. 247; *Bordman v. Reed & Ford*, 6 Peters, 328; *Woodfall's Landlord and Tenant*, last ed. 84; *Doe Freeland v. Burt* 1 T. R. 701; *Doe Lowry v. Grant*, 7 U. C. 125; *Jacob's Law Dic.* "Gift." Possession is evidence of livery, *Crabbe's Law of Real Property*; sec. 375.

Nolan, having entered under the deed, could not, nor, can defendant under him take exception to its operating as a deed. The deed would only operate from the delivery, and it is not shewn when it was delivered. The jury may presume it was not delivered until after the day of the *habendum*.

No demand of possession was necessary, for the estate the defendant acquired under the deed from Nolan had expired.

As to the possession by Nolan and defendant, it is consistent with the deed, and cannot in any exent operate to the prejudice of the plaintiff, she being under coverture.

O'Connor, contra.—There was no evidence connecting Nolan with the deed. It must operate as a feoffment, and there was no evidence of livery of seisin under it. The mere fact of Nolan being in possession is not evidence of livery: *Doe Walker v. Marquis of Cleveland*, 9 B. & C. 864.

The deed is inoperative and void, because the *habendum* makes the estate commence on the day after its date, creating a freehold estate *in futuro*, which is void. The day of the date, in the absence of evidence to the contrary, will be

presumed to bethe day of the delivery of the deed : Cruise's Digest, vol. i. 369.

Then as to the description of the land, there is nothing in the deed to show where lot. No. 41 is. The ambiguity is patent, and cannot be supplied by averments or evidence. It is not even described as his lot : *Sanderson v. Pier*, 5 Bing Shepherd's Touchstone, 250 ; *Sanderson v. Piper*, 5 Bing. N. C. 425 ; *Osborn v. Wise*, 7 C. & P. 761 ; Tay. Ev. under the head of " Ambiguities ;" 2 Starkie, Am. ed. 755 ; Wharton's Law Lexicon, 42.

RICHARDS, C. J.. delivered the judgment of the court.

Taking the grounds on which the nonsuit was first moved. As to the first objection.—It was not necessary to shew an assent of Nolan to the deed, if in other respects good and operative ; for by it the estate passed in his wife, and unless he did some act to disavow it, he and she would be seised in right of his wife of her estate.

As to the second ground.—Possession is evidence of seisin ; and when there was evidence of such possession accompanying and following the deed for over thirty years, the jury might well presume the seisin. In *Doe Wilkes v. Marquis of Cleveland*, referred to by Mr. O'Connor, Littledale, J., in giving judgment, says that no possession short of twenty years was sufficient to warrant the jury in presuming the fact of livery in that case. Here, where the other facts of the case would be more in favor of a presumption of the seisin than in the case referred to, the finding of the jury can be sustained.

In the Touchstone, at page 249, it is laid down that after lapse of time grants may be good, notwithstanding absence of evidence of livery, &c., for from possession, &c., livery, &c., will be presumed.

As to the third objection. There was evidence to go to the jury that Nolan entered under the lease, and we think the finding of the jury on that point right.

The forth and fifth objection will be considered more at length hereafter, in discussing the other grounds of the rule.

As to the six objections.—We fail to see any evidence that was not properly received. The surrounding facts at the time the lease or deed was executed were properly given in evidence in order to interpret it, and we can see no other evidence that we can say was improperly admitted.

The seventh objection will be considered with the fourth and fifth.

As to the eighth objection.—No demand of possession was necessary, if the estate of defendants was terminated by the death of plaintiff's husband.

As to the ninth objection.—The payment of rent is a matter of no consequence further than shewing that Nolan was in under the last, and that was shewn by sufficient evidence *aliunde*. It is not Snider or his heirs that are claiming, but the wife of Nolan, who claims the estate vested in her by the deed of her father, which her husband granted to the defendant, and which he properly held until the husband's death, but cannot hold any longer.

As to the tenth objection.—There was no authority cited to shew that the wife could not take the estate conveyed by the lease; and, in the absence of authority to the contrary, we see no reason why the estate should not vest in her.

As to the grounds taken in the rule *nisi* for a new trial.

The possession of Nolan was under the life estate granted to his wife, and the twenty years possession in him was quite consistent with the grant to the wife, as to the husband, by operation of law, was seised with the wife. When he made the grant to the defendant he conveyed an estate for his own life, if his wife should so long live; but as he is now dead, the right to possession reverts to the wife. *Jumpsen v. Pitcher*, (13 Simons 327), shews that if the wife had been out of possession forty years, her right would revive on the death of the husband after he had granted the estate, she being under the disability of coverture.

As to the second objection, it was not necessary that Nolan should be a party to the deed, nor was it necessary to shew an express assent thereto or affirmation thereof; but there was evidence from which the jury might infer that he had notice of the deed, and there was no evidence that he repudiated it.

As to the third objection, there was evidence to go to the jury on this point, and we cannot say as to it their finding is wrong.

The fourth ground for new trial will be considered hereafter, except that part which contends the deed is void for want of livery ; that point has been already disposed of, as we are of opinion there was evidence by possession, &c., to go to the jury of livery, &c.

The further ground of nonsuit taken in the rule, that the deed, under which the plaintiff claimed, was void because it was to operate *in futuro* ; this not having been taken at the trial, cannot now be allowed, for no leave was given to move on that ground.

The more difficult question raised at the trial remains to be considered. It is raised in various forms in the 4th, 5th and 7th grounds of nonsuit, and in the fourth ground in that part of the rule which relates to a new trial.

It is, whether the land is described with sufficient certainty in the deed, or whether the deed is void in consequence of the want of such description. In Shepherd's Touchstone, 250, it is laid down : " If one grant land meaning and professedly aiming to grant some lands in particular, and say not in what parish, or county, or village, it doth lie ; yet if there be any other matter to describe it, it seems the grant is good, and it may be averred and consequently proved where it lieth. But if there be no circumstantial matter in the grant to denote and cypher out where it doth lie, it seems the grant is void for uncertainty. If there be tenant for life of three houses and four acres of land, and he in reversion grant the reversion of the two houses and of two of the acres of this land, this is a good grant and hath sufficient certainty in it to be rendered complete by election ; but election must be made in the lifetime of the grantor and of the grantee."

The modern doctrine in interpreting the meaning of a grant or other instrument, is to ascertain the surrounding facts at the time the same was made. We learn from the evidence that John Snider was a resident of the township of Colchester, in the county of Essex ; that he resided on lot number forty-one, in the first concession of that township ;

and whilst he so resided there, he granted to Hannah Snider all that lot or parcel of land commonly known by part of lot number forty-one, containing fifty acres, butted and bounded as follows, (the boundaries in the deed would correspond with the fifty acres off the rear of the lot on which he lived). Looking at these facts, does he by the deed grant part of the lot on which he resided? Suppose the description in the grant had been, "all that part of my lot commonly known as number forty-one, containing fifty acres, butted and bounded as follows," (then giving the description); with evidence that he owned the lot forty-one in question, and no evidence or probability that he did own any other lot forty-one, would there not be reasonable certainty as to what he intended to grant? And if, immediately after the grant, the grantee, with the grantor's assent, went into possession and enjoyed it up to the time of their respective deaths without opposition, would not this be considered a good grant against the heirs of the grantor? Are not the words in the grant, with the surrounding facts, and what immediately followed after it, sufficient to fix with reasonable certainty that the land sued for passed by the grant? Though not free from doubt, I think we may so hold. Many of the authorities on this subject are collected in Taylor on Evidence, in the notes under the head of "*Falsa demonstratio non nocet.*"

As to the alleged misdirection complained of, in telling the jury that parol evidence might be given to show what was intended to be demised in the lease, which could not be given in relation to a deed, and leaving it to the jury to say if the land to be recovered in this action was that covered by the deed, we fail to see how the matter complained of could prejudice the defendant; for in our view the evidence given on the trial was properly received, and, taking it in connection with the instrument produced, we think the deed covers the land in dispute.

As to the question of the conveyance to the plaintiff being void because it creates a freehold estate, which, apparently, begins to operate *in futuro*. In page 251 of the Touchstone it is laid down: "So if one grant anything that doth lie in livery or in grant, and that is in *esse* at the time of the grant, in fee simple, fee tail, or for life, and the estate is to begin

at a day to come, this, for the most part, is void. Howbeit in some cases the livery of seisin, if made after the day, or the delivery of the deed of grant after the day, will help it."

"If A. by deed give land to B., to have and to hold after the death of A. to B. and his heirs, this is a void grant by deed; and therefore, if upon this deed livery of seisin be made before the day by the party himself, or at or after the day by his attorney *secundum formam et effectum chartæ*, the livery is void also, for it cannot enure so; that is, an estate in freehold cannot be granted to commence *in futuro*. And yet if a lease be made for life to being *in futuro*, and at, or after the day came, the lessor himself in person doth make livery of seisin *secundum formam chartæ*, in this case the lease, perhaps, may become good by this livery of seisin. It has been supposed that the attorney could not by delaying livery make that grant good which would, if livery had been made at the time, have been void. If he had authority to make livery at or after the day, the livery would be good; and now a letter of attorney to make livery of seisin, according to the form and effect of the deed, would warrant and support a livery after the day appointed for the commencement of the estate:" Touchstone, p. 219. So in Crabbe's Law of Real Property, sec. 751: "If the *habendum* in a lease for lives is from the day of the date, the lease is void, for it is a freehold to commence *in futuro*; but if there is power for lessor's attorney to take possession and deliver seisin, which is accordingly done, it is good; for till seisin delivered the freehold shall be considered as still continuing in the lessor."

These authorities shew, then, that though the instrument under which the plaintiff claimed might, if executed on the day it bears date, and livery of seisin given on the same day, be void; yet, if it was not executed until after the day it was to begin to operate, or if livery was not delivered until after that day, then it would be good.

If the defendant had raised the objection now taken at the trial, we do not know but the plaintiff might have met it by proving that the deed was not actually delivered until after the day it was to begin to operate, or that livery of seisin had not been delivered under it until after that day;

and under the peculiar facts of this case I am by no means certain that it would have been improper for the learned judge to have asked the jury whether they would not have presumed one or both of these propositions in favour of the plaintiff.

In this view of the case, the omission to raise the question by the defendant at the trial becomes of more importance than simply not complying with a mere rule of practice, and should induce the court to have less hesitation in refusing to allow the defendant to have the same advantage from this point as if it had been raised at the proper time.

From the report of the case by the learned judge and from the evidence it appears, that over forty years ago the father of the present plaintiff, with the view of making some provision for his daughter, who had married a man of unsteady habits, gave her the conveyance of the estate for life in the fifty acres of land now in dispute between the parties.

Her husband, after residing on the place for a short time, seems to have separated from her; and instead of this property being applied to the support of the daughter of the former owner, she lived in the neighbourhood for the last thirty years, dependent more or less on the charities of those who were acquainted with her, having none of the comforts of the home which her father hoped he had provided for her. The worthless husband seems to have leased the lot, from time to time, using the rent for his own purposes, and leaving his wife without the means of support. This state of things continued until 1856, when he sold the land to the defendant.

There is no reason to suppose that the defendant was ignorant of the state of the title when he purchased the land. The instrument itself was registered *in extenso* in the registry office of the county, and thus the defendant had the means of learning all about it. From this instrument he must have been aware that the property came from the father of the plaintiff, and was given to her for life. There is no reason to doubt that he must have known that Nolan had abandoned his wife, and had left her without the means

of support. Under these circumstances, without in any way, so far as we can see, obtaining the consent of the wife, he purchased the right to enjoy her estate from her improvident husband. He has enjoyed that estate during the life of that husband, and his legal right to do so is not disputed; but to claim that he has now the right to hold the estate as his own, and add to the wrongs this unfortunate woman has suffered for the last quarter of a century or more, by depriving her of that which, now that her husband is dead ought by every consideration of justice to be hers, he should be able to establish a very clear case.

Certainly the facts as presented to us do not shew that the preteusions of this defendant to hold this land are based on any very broad principles of justice and right, nor do they impress us as being of a class to induce us to relax any of the rules of law or practice in his favour.

The judgment in this case binds no right: the defendant, if he thinks he can make out a better case than was presented for him at the last trial, can bring an action to recover the land, when the question on which we are now asked to decide in his favor, that has not been properly brought before us for discussion, can be raised in a proper form and decided.

His claim is one of strict legal right, and must be presented to us so that we can decide it on its strict legal merits, and we cannot be expected to relax any of the established rules of practice to favour a claim like this.

The rule moved by defendant must be discharged.

Rule discharged.

. LEATHERMAN ET AL. V. TROW.

Aliens—Con. Stats, C. ch. 8 sec. 9—9 Geo. IV. ch. 21.

A., an alien, born in the United States, received a patent for land here in 1826, and in the same year went back to the States, where he died in 1855. Some of his children were born in the States, some here; but they all lived there, and they all brought ejectment.

Quære—Whether those who were aliens could recover under Con. Stats. C. ch. 8, sec. 9. *Seemle*, that they could, for that that clause is not confined to aliens resident here.

Quære—Whether under 9 Geo. IV. ch. 21, A having obtained a patent from the Crown, would be entitled to the benefits of that act, without proof that he had taken the oath of allegiance.

This was an action of ejectment to recover the west half of lot No. 33, in the 13th concession of East Zorra, in the county of Oxford, except the south-west six acres, sold by James Carroll, Esq., sheriff of the county of Oxford, to Thomas C. Street, Esq., for taxes.

The summons was tested the 16th of January, 1865.

On the 6th of February, 1865, James Trow appeared to the writ, and defended for the the whole of the land mentioned in the writ.

The plaintiffs claimed title to the land as heirs and heiresses-at-law of the late Jacob Wideman, deceased, who was the original patentee of the crown.

The defendant, besides denying the title of the plaintiffs or of either of them, asserted title in himself, by virtue of a deed of conveyance from one Young to himself.

The cause was taken down to trial at the last Spring Assizes for the county of Oxford, held before Mr. Justice Hagarty.

The plaintiffs put in an exemplification of the government patent of the lot in question to Jacob Widman the younger, of the township of Whitechurch, in the county of York, in the Home District, yeoman, dated on the 20th June, 1826. It appeared to have been granted under an order in council of 13th September, 1819, with patent and survey fees paid, and settlement duties performed.

Anna Wideman, the widow of Jacob Wideman, proved that she and her husband were both born in the United States, but were partly brought up in Canada. She was born in Pennsylvania, in 1791, and he was three years older

than she. They were married at Newmarket, in 1811, and seven of the plaintiffs, whom she named, were born in Upper Canada. He got men to do the settlement duty on the lot, and paid them for it in cattle. In 1826 he went to Ohio to live, and he resided there until the time of his death in 1855, having never returned to Canada in the interval. She was not aware that her husband had ever taken the oath of allegiance in Canada; she did not remember his getting a patent for the lot. The plaintiffs all resided in Ohio; and until lately the family never tried to get possession of the lot.

A gentleman of the bar, on behalf of the defendant, objected that four of the plaintiffs were born abroad and were aliens.

There was a verdict for the plaintiffs, with some reservation, if the court should think that the plaintiffs born abroad could not inherit by reasons of their alienage.

In Easter Term last, *A. Crooks, Q. C.*, obtained a rule *nisi* to enter a nonsuit, or verdict for the defendant, pursuant to leave reserved, upon the grounds that the plaintiffs, who claimed title to the premises in question as heirs-at-law of Jacob Wideman, inherited no estate in the land, inasmuch as the said Jacob Wideman was an alien, and not a naturalized British subject at the time of his death; and also because such, if any, of the plaintiffs as were heirs-at-law of the said Jacob Wideman, were also themselves aliens and incapable of inheriting.

The rule was enlarged until the present term, when

J. A. Boyd, for plaintiffs shewed cause, taking very broad ground, that the doctrine of the English law did not apply to this colony, unless expressly introduced here by statute; that although the English law of alienage, as between subjects, might be in force by virtue of provincial statute 32 Geo. III. ch. 1, yet it was evident from the provincial statute passed in relation to crown grants of wild land that the English rule, as to a grant of lands by the crown to an alien being void, was not by that statute introduced, and that, therefore, the plaintiffs' father could take, and they could inherit notwithstanding the alienage of the father.

That this case raised a different point from that decided in many of the cases in our own courts ; for the grant here was direct from the crown to the alien ; and if the estate passed from the crown, it would at all events descend to such of the grantee's children as were subjects ; that an alien might take, if the purchase was made with the king's license, and the grant being made by the king, it must have been by his license ; that under any circumstances plaintiffs' ancestor would be considered a British subject under the provision of provincial statute of George IV, he having obtained a grant of land from the crown, and it would be presumed he had taken the oath of allegiance.

He cited the following authorities : Co. Lit. bk. i. cap. 1, sec. 1, 2*b*, Butler & Hargrave's notes, note 4 ; 14 Henry IV. 20 ; Chitty's Blackstone, vol. ii. bk. ii. pp 249, 293 ; Co. Lit. 31*b*, note 9 ; Imp. Stats. 12 & 13 Wm. III. cap. 2 ; 13 Geo. II. cap. 7 ; 2 Geo. III. cap. 25 ; 13 Geo. III. cap. 25 ; Prov. Stat. 4 & 5 Vic. cap. 100 ; *Goodell v. Jackson*, 20 Johnson, 694 (in Error) ; *Williams v. Lee*, 2 U. C. C. P. 185 ; *Doe d. Park v. Henderson*, 7 U. C. Q. B. S. 190 ; *Doe d. Hay v. Hunt*, 11 U. C. Q. B. 381, 390 ; Prov. Stat. 2 Wm. IV. cap. 7 ; Imp. Stat. 11 & 12 Wm. III. cap 6 ; 12 Vic. cap. 197, sec. 12 ; Con. Stat. C. cap. 8, sec. 9 ; *Irwin v. McBride*, 23 U. C. Q. B. 570 ; *Doe d. O'Connor v. Maloney*, 9 U. C. Q. B. 252 ; *Murray v. Heron*, 7 Grant, 179 ; Robertson's Digest, L. C. R. 22, 23 ; *Corse v. Corse*, 4 L. C. R. 310 ; Prov. Stat. 9. Geo. IV. cap. 21 ; *Blight's Lesses v. Rochester*, 7 Wheaton, 535 ; *Doe d. Thomas v. Acklam*, 2 B. & C. 779 ; *Doe d. Macfarlane v. Lindsay*, Draper, 131, 136 ; *The Mayor of Lyons v. The East India Company*, 1 Moore, P. C. 281, 287.

C. Robinson, Q. C., contra.—The statute of Geo. IV, is only declaratory of the common law. Those who claim under the proviso are bound to shew that they took the oath of allegiance, as required by the statute, before they can bring themselves within it. The knowledge of the fact is peculiarly that of the person who takes the oath, and the statute provides the mode of registering and proving the oath taken. As to 12 Vic. cap. 197, that applies to aliens in Canada, and not to aliens residing out of the Province :

Irwin v. McBride, 23 U. C. Q. B. 570; *Doe Robinson v. Clarke*, 1 U. C. 37; *Doe Chandler v. Tesseir*, 6 U. C. 216; *Wallace v. Hewitt*, 20 U. C. 98; *Wallace v. Anderson*, 10 U. C. C. P. 338; *Doe Richardson v. Dickson*, 2 U. C. O. S. 300; *Doe Macdonald v. Cleveland*, 6 U. C. O. S. 121.

Some of the plaintiffs cannot inherit by reason of their alienage.

RICHARDS, C. J., delivered the judgment of the court.

The only ground on which leave was given at the trial to move the court seems, from the notes of the learned judge, to have been this, that some of the plaintiffs could not recover by reason of their alienage. As to the other and more important ground taken in the rule, that the plaintiffs could not inherit from Jacob Wideman by reason of his alienage, that does not seem to have been taken at the trial at all; or, if taken, is not noted as a ground of nonsuit, or on which to enter a verdict for the defendant. There does not appear to have been any objection to the ruling of the learned judge at the trial, if he did so rule, that the alienage of the father was no obstacle to his heirs inheriting from him, when the grant was from the crown. The defendant could not properly move for misdirection for want of exception to the judge's charge.

The defendant also filed an affidavit of the case being taken in his absence, &c., and his counsel was informed that he was at liberty to take a rule on the ground of merits, if he thought proper, but he did not do so.

On the argument it was stated that the plaintiffs are now prepared with evidence to show that the grantee of the crown did take the oath of allegiance in this province before 1828, whilst residing here, and this would put the case beyond all doubt.

The only point properly before us on this rule is whether those plaintiffs, who are aliens, can maintain their verdict.

Con. Stats. of Canada (cap. 8, sec. 9) seems to me to declare the law in their favour. It enacts that every alien shall have the same capacity to take, hold, possess, enjoy, claim, recover, devise, impart, and transmit real estate in

all parts of this province as natural born or naturalized subjects of Her Majesty in the same parts thereof respectively.

The proviso to the section declares that it shall not in any manner affect any right or title legally vested in or acquired by any person before the 23rd November, 1849.

There is nothing in the statute limiting its operation to persons resident within the province, nor am I aware of any case in our courts intimating that it is so limited, except in *Doe O'Connor et al. v. Maloney* (9 U. C. 252).

The judgment of the late chief justice of Upper Canada, (Sir J. B. Robinson), nevertheless, in *Doe Hay v. Hunt* seems to point to a view of the statute favourable to the plaintiffs. However, it is not necessary to decide the question now; for if the alien heirs cannot take, those who are natural born subjects can, and they are also plaintiffs; and in that view the decision of the point is of no practical importance to the defendant.

As to the general question of the right of aliens to take and hold real estate in this country without being naturalized, independent of our acts of parliament, and the general doctrine that the disability of aliens to hold lands in England arises from the acts of the Imperial Parliament and not at the common law, I am not prepared, against the traditions of our own bar and the decisions of our own courts, to go into these questions now, notwithstanding Mr. Boyd's able and learned argument, for they do not properly arise in this case; and if they did, I think it would be more for the interests of the plaintiffs to settle in their favour the question of fact; namely, that Jacob Wideman, being resident in this province in 1820, took the oath of allegiance before some person duly authorized to administer it prior to 1828, which I understand they are prepared to do.

The affidavit of merits shewed that, owing to the railway trains not connecting as was expected, the defendant's counsel could not get to the assizes before the case was disposed of; that an application had been made to add another ground of defence than that put in the notice, and this application was made returnable before the judge of assize. The

affidavit of the defendant's attorney, on which that application was made, was filed amongst the papers in the cause when the defendant's motion was made. The attorney swears to inquiries into the nature of the defence, states his belief that Wideman conveyed the land about thirty-five years ago to one Joshua Davis, though he is not sure the deed can be found, and that before Wildman left Upper Canada, the land was occupied and in the possession of parties through whom the defendant could shew a good title.

On the whole, I think the more satisfactory course would be to allow the defendant to go into a defence. If the present verdict stands the possession will be changed, and if it is wrong, much injury will be done the defendant, which cannot be repaired by merely restoring the possession. If a new trial is granted, and this would have been allowed on the materials filed in the court, if the defendant's counsel had taken the rule on the merits, if the plaintiffs succeed they will only have been kept out of the possession of a property for a few months longer, which they and their ancestors did not consider worth looking after for thirty or forty years.

On the whole, I think, under the peculiar facts occurring at the trial and shewing by the affidavits, we may grant a new trial on payment of costs.

The affidavit of the defendant and his attorney shew that the professional gentleman who interfered in the case at the trial was not authorised to do so.

Rule absolute for new trial no payment of costs.

FRIEL V. FERGUSON ET AL.

Magistrate—Trespass—Information—Warrant, evidence of—Joint tort—Evidence—Notice of action—Direction to jury—General verdict—Restricting to one count—Verdict against two defendants on separate counts.

The warrant of a magistrate is only *prima facie*, not conclusive evidence of its contents; as, for instance, of an information on oath and in writing having been laid before him.

Such information must be, under Con. Stats. C. cap. 102, sec. 8, not only on oath, but in writing; and, except on an information *thus* laid, there is no authority to issue the warrant.

In this case, the magistrate having acted in direct contravention of the statute, in issuing a warrant without the proper information under the statute, or without even a verbal charge having been laid against the plaintiff, and there being no evidence of *bona fides* on his part, the court held that he was not entitled to notice of action.

Semble, 1. That the fact of a magistrate's issuing a warrant without the limits of the county for which he acts does not necessarily disentitle him to notice of action. 2. That such notice will be bad, if it omit the time and place of the alleged trespass.

A general verdict, on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court being of opinion that there was only one joint cause of action against the defendants, that is the arrest, restricted the verdict to that count.

Held, also, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued and the other issued it; that both knew that no charge had been made against plaintiff; that the warrant was given by the one to the other for the arrest of plaintiff, who was accordingly arrested upon it, and that illegally.

Held, also, that the effect of this evidence was not destroyed by the fact, that the arrest was made in another county and under the authority of another magistrate's endorsement upon the warrant; for that that endorsement was not strictly the authority to arrest, but merely to execute the original warrant; and that the arrest was wrongful not from the endorsement, but from the antecedent illegal proceedings of the defendants; and that the defendant who issued the warrant was as much responsible as if the arrest had been made in his own county.

Semble, 1. That if it had appeared that defendant who issued the warrant, was liable in *case* only, and malice of some special kind, personal to himself, in which his co-defendant was not, and could not be a partaker, had been proved, a joint action would not lie against both. 2. That one defendant might have been convicted in trespass, and the other in case.

This was an action for arrest and malicious prosecution.

The first count was in trespass for the arrest, and for delivering the plaintiff to a constable, who kept him in custody for ten days.

The second count was in case, for maliciously and without reasonable cause procuring the plaintiff to be arrested and imprisoned in the custody of a constable for the space of five days, on a charge of felony.

The defendant Ferguson in person, and Collinson by Ferguson, his attorney, pleaded, severally, Not guilty by statute.

The venue was laid in the county of Leeds, one of the United Counties of Leeds and Grenville.

The trial took place before Morrison, J., at the last Brockville Assizes, and a verdict was rendered for the plaintiff for \$300 damages.

The following facts appeared: That Ferguson was an attorney, and was Reeve of the township of Pittsburgh, in the county of Frontenac, where the warrant afterwards mentioned issued; that the plaintiff brought an action for the seduction of his daughter against Collinson; that Collinson on the 7th of July, 1864, asked one P. H. Russel to go from Leeds to Kingston, and paid Russel \$2 for going with him; that Collinson and Russel went together to Ferguson's office, when Ferguson asked Russel about some tea-meeting tickets; that they afterwards talked about forged notes; that they wanted Russel to be a complainant against plaintiff, but he would not; that Ferguson wrote a paper, and Collinson got it, but Russel had nothing to do with it, the first that Russel knew of the issuing of a warrant against the plaintiff being, when he was summoned by Collinson to attend before Mr. Moulton, a Magistrate, at the township of Leeds, to give evidence against the plaintiff, who was then in the custody of a constable; that Collinson got a warrant from Ferguson against the plaintiff and gave it to Mr. Moulton, and another paper also, which appeared to the latter to be an information with Russel's name in the body of it, and which was handed back to Collinson again, who took it away; that Moulton backed the warrant to Collinson, and gave it to him; and that Collinson afterwards told the magistrate that the plaintiff had been arrested, and he got summonses for the witnesses to attend and give evidence against the plaintiff; that Moulton, when the plaintiff was brought before him, took the depositions of the witnesses, and after doing so he told the plaintiff he saw nothing against him, but as the warrant came from another county he could not discharge him; that Collinson had the warrant and the magistrate sent the plaintiff to the defendant, Ferguson, at Kingston, in charge of the constable; that the plaintiff, when taken by the constable to Ferguson, was sent back by Ferguson to Moulton at Leeds; that Ferguson

said to the constable he could not act on the depositions taken by Moulton, whereupon the plaintiff was conveyed by the constable to Leeds; that Moulton could not be found for two days, and on the third day, when he was found, he discharged the plaintiff.

The general facts, therefore, seem to be, that Collinson; having been sued by the plaintiff for the seduction of plaintiff's daughter, procured a warrant from his co-defendants, Ferguson, in the city of Kingston, while Ferguson was a magistrate only by verdict of his office as Reeve of the township of Pittsburgh, against the plaintiff upon a charge of forgery without any complaint or information having been made by any one to authorize the issuing of the warrant. Upon the warrant the plaintiff was arrested in Leeds, and after an examination there he was sent by Moulton, the magistrate at Leeds, in charge of a constable, to Ferguson at Kingston; then sent back again by Ferguson to Leeds; and, after seven days, he was finally discharged by the magistrate, because there was no case against him.

There can be no doubt that this was a most wanton and malicious proceeding by Collinson against the plaintiff, and that he prosecuted the plaintiff, as suggested, for the purpose of compelling him to drop, or to arrange on some kind of favourable term the action for seduction, which the plaintiff had then pending against him.

As to Ferguson, the only facts against him are that he had no authority, as a magistrate, in the city, of Kingston for he was not magistrate of the city, but of the county of Frontenac, by reason of his official position as Reeve of Pittsburgh, and that he issued the warrant without any charge or information having been first made, he being the attorney for Collinson in the action for seduction.

At the close of the plaintiff's case several objections were taken, which were for the time overruled, and leave was reserved to the defendant, Ferguson, to move to enter a verdict for him, if the court should think a notice of action to have been necessary, and the one served upon him was defective.

In Easter Term following, *J. Gwynne, Q. C.*, obtained a rule *nisi* calling upon the plaintiff to shew cause why a

nonsuit should not be entered in favor of the defendant, Ferguson, in pursuance of leave reserved at the trial, for want of proof of sufficient notice of action; or why a new trial should not be had by Collinson, or by both the defendants, without costs, on the following grounds:—

1. That the declaration, containing two counts, one in trespass and the other in case, and the verdict being rendered generally, the verdict was contrary to law.

2. That the learned judge, who tried the cause, erroneously received evidence for the plaintiff under the count in trespass and under the count in case, and submitted all such evidence to the jury; and that such reception of evidence and submission thereof to the jury were, under the circumstances, contrary to law and evidence.

3. That the evidence tendered for the plaintiff failed to establish a joint tort, for which the defendant could in law be held jointly liable, and that, therefore, the verdict rendered against the defendants jointly was erroneous.

4. That the learned judge improperly refused to receive evidence tendered on the part of the defendants, for the purpose of establishing the truth of the charge, in respect of which the warrant under which the arrest of the plaintiff complained of took place.

5. That the only evidence against the defendant, Ferguson, having been the issuing of the warrant produced at the trial, and the only evidence against the defendant, Collinson, having been of acts done without the jurisdiction of Ferguson, such acts were not sufficient to warrant a joint verdict against the defendants, or against either of them.

6. That the learned judge, who tried the cause misdirected the jury in this, that he directed the jury that, as a matter of law, the defendant had acted in the premises without any reasonable or probable cause, and that malice was necessarily to be assumed, although the learned judge had refused to receive evidence tendered for the defendants, to establish the truth of the charge against the plaintiff mentioned in the warrant, and to shew the absence of malice and the presence of reasonable and probable cause: and because the learned judge refused to leave it to the jury to determine as a fact, whether the defendants, or either of

them, acted in good faith, or to receive evidence to establish such acting in good faith.

7. That the learned judge misdirected the jury in this, that he left it to the jury to find that the warrant, under which the plaintiff's arrest took place, issued without any previous information, although the warrant, having been put in evidence by the plaintiff, sufficiently established the fact of such previous information having been taken.

8. That the evidence adduced by the plaintiff established that no action but an action in case could be sustained against the defendant Ferguson; and that the only action [if any] established against the defendant Collinson was an action of trespass; and that under these circumstances the joint verdict against both defendants, or any verdict against either of them, was contrary to law and evidence.

9. That no sufficient evidence was given to justify any verdict against either of the defendants; for the learned judge strongly charged the jury that there was evidence to warrant them in rendering a verdict against both of the defendants.

10. That, as against the defendant Ferguson, the venue laid in the declaration was wrongly laid, and, therefore, as against him no verdict could properly be rendered; so that the joint verdict was contrary to law.

In Trinity Term last *Sir Henry Smith, Q. C.*, shewed cause.—Ferguson was not entitled to notice of action at all, because he was not a magistrate in the city of Kingston, when he made his warrant; and because he issued his warrant without any complaint or information having been made to him, either verbally or in writing.

But if a notice were necessary to be given, the one served was sufficient. It is said to be defective in the statement of time and place, when and where the alleged wrongs were committed. The plaintiff is described in the notice as of the township of Leeds, in the county of Leeds. The first part of the notice which is applicable does not mention any time or place, when or where the trespass on the plaintiff was committed, but specifies simply the assault and imprisonment complained of. The second part of the notice, which is the part that is applicable to the second count,

states the wrong as having been committed by the defendants "on the said 9th day of July last past, at the township of Leeds aforesaid."

The original notice, which was retained by the plaintiff's attorney, does describe a place, which the copy does not, where the trespass was committed, namely, "at the said township of Leeds;" but this too is objected to on the same ground that is raised against the sufficiency of the place as to the second part of the notice. It is objected by the defendant Ferguson, that there is no such place as the township of Leeds. It is true the Upper Canad Territorial Act has no such township in the county of Leeds as the *township* of Leeds; and that what was formerly the township of Leeds and the township of Lansdowne," is now called, as townships, "Front of Leeds and Lansdowne," and "Rear of Leeds and Lansdowne." But the 12th Vic. ch. 99 (Private Acts) shews that these present townships are formed only for municipal and election purposes; and the Act of Canada, respecting the Provincial Statutes (ch. 5, sec. 6), provides, that "the name commonly applied to any country place * * * shall mean such country place, * * * although such name be not the formal and extended designation thereof;" and as the locality in question is commonly known as the *township* of Leeds, it is sufficiently described as such, although they may not happen to be the strictly formal designation thereof.

Besides, the defendant, in the warrant which he signed, has described the plaintiff as of the *township* of Leeds, and has described the offence therein charged against the plaintiff as having been committed in the township of Leeds, and he cannot now be heard to say he has been misled by the description of place in the notice which has been served upon him.

A notice without any place at all would be bad: *Martin v. Upcher* (3 Q. B. 667).

As to there being a joint wrong by the two defendants: Collinson wrongly procured the warrant from Ferguson, Ferguson wrongly issued it, and then delivered it wrongfully to Collinson to be executed, and it was executed.

This made them joint wrongdoers, particularly under the circumstances disclosed by the evidence.

Both the defendants knew there was no information in writing, and the Statutes of Canada (ch. 102, sec. 8) shew it must be made in writing and under oath.

As to the general verdict on both counts, he referred to *Hunt v. M'Arthur* (24 U. C. Q. B. 254); *Mason v. Morgan* (24 U. C. Q. B. 328); *Haacke v. Adamson* (14 U. C. C. P. 207).

As to the alleged refusal of the judge at the trial to receive evidence of the truth of the charge against the plaintiff, it is not correct: the learned judge did not refuse such evidence, but, on the contrary, offered to receive it.

The venue was properly laid in the county of Leeds, for it was there the arrest, the act complained of, took place: Con. Stat. U. C. ch. 126, s. 11.

It was, also, properly left to the jury to say whether there had been an information in fact made against the plaintiff, and the jury were right in finding there had not been an information upon the evidence submitted, although the warrant produced by the plaintiff recited that an information had been made in the matter.

Trespass was maintainable against Collinson, as well as case: *Hunt v. M'Arthur*, before cited; *Leary v. Patrick*, 15 Q. B. 268.

Gwynne Q. C., supported the rule.—Notice of action to Ferguson was necessary, although he acted without authority: *Bross v. Huber*, 18 U. C. Q. B. 285; *Kirby v. Simpson*, 10 Ex. 358; *Morris v. Smith*, 10 A. & E. 188; *Prestidge v. Woodman*, 1 B. & C. 12; *Rex v. Mattos*, 7 C. & P. 458.

At most, this was a case of an excess of jurisdiction, not a case where there was no jurisdiction: Ferguson had jurisdiction over the offence, but not in Kingston, where he made his warrant.

The notice which was served was sufficient for the reasons already stated: *Martin v. Upcher*, before cited; *Breeze v. Jerdein*, 4 Q. B. 585; *Prickett v. Gratrex*, 8 Q. B. 1020; *Madden v. Shewer*, 2 U. C. Q. B. 115; *Connolly v.*

Adams, 11 U. C. Q. B. 327 ; *Cronkhite v. Sommerville*, 3 U. C. Q. B. 129.

There was no evidence of any joint act by both the defendants. Ferguson cannot be liable for anything that took place after the making of the warrant ; nor for the arrest, because that took place under the backing by Moulton in the county of Leeds ; nor for the plaintiff having been sent by Moulton up to Kingston. Moulton did take and could take these depositions, and adjudicate upon the charge himself : Con. Stats. for Canada, c. 102, secs. 47-48. Nor can he be liable for refusing to accept of the plaintiff and to try the case in Kingston, and for the plaintiff's being conveyed back to Moulton in Leeds.

The question of malice should not have been left to the jury under the count in trespass, although it might properly have been left to them in the count on case ; and this shews the objection to the joinder of these counts, for the plaintiff was making the cause of action upon one count, while he was going to the jury for damages upon the other count. The plaintiff should have been nonsuited : Con. Stats. U. C. c. 126, s. 16 ; *Warner v. Guinlock*, 21 U. C. Q. B. 260.

If he gave evidence of malice he should have been confined to the count in case only ; nor should it have been left to the jury to say whether there had been an information in fact or not, and to infer malice if there had not been, for the warrant recited there had been an information, and it was not competent to the plaintiff to contradict it after he had put it in evidence as part of his case. The notice to produce, also, which he served, called for the production of the information, and he could not be permitted to call for the information, and then to assert there was not one.

The venue should have been laid in Frontenac and not in the county of Leeds.

A. WILSON, J., delivered the judgment of the court.

The first part of the rule raises the questions, whether the defendant Ferguson was entitled to notice of action ; and, if he was, then, whether the notice, which was served upon him, was sufficient.

It is contended he was not entitled to the notice :

1st. Because he acted without having taken any information, or having had any charge made before him against the plaintiff; and

2nd. Because he made and issued his warrant to arrest the plaintiff in the city of Kingston, in which place he was not a magistrate.

By the Consolidated Statutes of Canada, (c. 102, s. 8,) it is enacted, that "in all cases, when a charge or complaint for an indictable offence is made before any Justice of the Peace, if it be intended to issue a warrant in the first instance against the party charged, an information and complaint thereof in writing, on the oath or affirmation of the informant, or of some witness in that behalf, shall be laid before such justice."

There should have been a charge or complaint made before the warrant issued, and it should have been in writing.

The only evidence of there having been a charge made to justify the issuing of the warrant, is the recital of it in the warrant itself, which states that, "whereas John Friel and Benjamin Friel, of the township of Leeds, in the county of Leeds, have this day *been charged upon oath* before the undersigned, one of Her Majesty's Justices of the Peace in and for the said united counties," referring to the united counties of Frontenac and Lennox and Addington, in the margin of the warrant. If this statement be conclusive, because the warrant was put in by the plaintiff as part of the case, because the plaintiff's objection that there was no charge in fact made, will have been repelled.

That it is evidence for the defendant is no doubt correct: *Haylock v. Sparke* (1 E. & B. 471); but how can it be said to be *conclusive* evidence of the truth of the fact? That would be to make the very ground of complaint against the magistrate a full and sufficient justification for his misconduct, and for the injury he had done to the plaintiff. The plaintiff's assertion is, that the warrant is false in fact; and the defendant's answer is, that although it be so, the plaintiff is not to be allowed to say so. This would be to carry the doctrine of estoppel to an alarming

extent, if a warrant, which is not an adjudication or conviction, but a mere personal order of the magistrate to arrest the plaintiff, drawn up by himself, and upon his own individual responsibility, were to draw along with it the same incontrovertible verity which a record does, so long as it remains unimpeached.

No authority was cited for this position, and we can find none for it; and we think the law is quite favourable enough for the magistrate, by making it evidence, that is, *prima facie* evidence, for him, and leaving it for the plaintiff to repel, if he can, this *prima facie* case.

In *Leary v. Patrick* (15 Q. B. 272), where the conviction had been quashed, and did not recite that the magistrates had awarded costs, but they issued a distress warrant, which recited that they had adjudicated upon them, Lord Campbell, C.J., asked, "Was there any evidence that the justices did in fact ascertain the amount of the costs, except the recital in the distress warrant? And he afterwards said: "The distress warrant recited an adjudication to pay costs, but that was contrary to the fact. The imprisonment and warrant and seizure are all defended on the ground that there was an adjudication to pay costs; and as there was no such adjudication, I think it is an illegal warrant, and that the imprisonment was wrongful, and the seizure of the goods an excess of jurisdiction."

The distress warrant, in that case, was entitled to as much faith and credit as the warrant in the present action: the one was not only tested by the conviction, but by the actual fact, apart from the conviction, whether such an adjudication had or had not been made; and the present warrant can be tested, also, by the alleged information, if there be one, or by the absence of one, if it be shown that there was not one in fact.

We think the plaintiff had the right in law to show there was no such charge made before the defendant Ferguson, as he had represented in his warrant; and we think it was proved, by reasonable evidence, at the trial, that no charge of any kind, verbal or in writing, on oath or without oath, had ever been made to the magistrate, as he has described in his warrant.

Then, as to the effect of acting without an information upon oath.

It appears that the law always required there should be an information: *Rex v. Fuller* (1 Ld. Ray. 509); and that in strict form it should have been in writing: *Brookshaw v. Hopkins* (Lofft. 240). In *Rex v. Birnie* (1 Moo. & Rob. 160) it was decided by Lord Tenderden, C. J., that magistrates had no right to detain a known person to answer a charge of misdemeanor verbally intimated to them, but without a regular information before them in their capacity of magistrates, that they may be able to judge whether it charges any offence to which the party ought to answer.

In the *King v. Wheatman*, (Dougl. 346,) Lord Mansfield, N. J., said, "The defendant can be convicted only of the charge in the information, and that must be sufficient to support the conviction;" and Ashurst, J., added, "The evidence must prove, but cannot supply any defects in the information."

In *Baxter v. Carew*, (3 B. & C. 649,) it was ruled that magistrates were not obliged to take an information upon oath, when the statute did not require they should do so.

In *Reg v. Millard*, (17 Jur. 400,) Parke, B., said, "No magistrate can proceed without an information; but unless the statute require that the information should be in writing or on oath, it need not be so."

In *Caudle v. Ferguson*, (1 Q. B. 889,) where the clerk of the magistrate had taken the information in the absence of the magistrate, and the warrant to arrest did not recite any information, Lord Denman, C. J., said, "The warrant is clearly insufficient: it does not state any information on oath: the magistrate's jurisdiction depends not on jurisdiction over the subject matter, but over the individual arrested: to give him that jurisdiction, there should have been an information properly laid."

Coleridge, J., said: "It is true that a magistrate has jurisdiction over the offence in the abstract; but to give him jurisdiction in any particular case, it must be shown there was a proper charge upon oath in that case. A man, because he is a magistrate, has no right to order another to be taken for an offence over which he has jurisdiction,

without a charge regularly made. The warrant does not state a charge, and the facts, independent of the warrant, do not shew such a charge on oath as justifies the defendant."

See also *The Queen v. The Justices of Buckinghamshire*, (3 Q. B. 807); *Haylock v. Sparkes* (1 E. & B. 485); 1 Wm. Saund. 262, note (1): and *Crepps v. Durden* (1 Smith's L. C. in the notes.)

These declarations of the law, coupled with the positive provisions of the statute, that an information in writing and on oath *shall* be laid before the magistrate, leave on doubt that it was not only the duty of the defendant Ferguson, but that he had not authority to issue his warrant for the arrest of the plaintiff without such information having been first made to him.

The direction which the judge ought to give to the jury in an action against a justice, would be and should be to this effect, whether Ferguson honestly believed he was acting in the execution of his duty, as a magistrate, with respect to any matter within his jurisdiction—(see U. C. Act, ch. 126 sec. 1); or whether he honestly believed he was acting in the execution of his office, (s. 9); or, as it is put in *Roberts v. Orchard*, (2 H. & C. 769, in the Exch. Ch.) following the direction in *Hermann v. Tenneschall*, (C. B. N. S. 392,) whether Ferguson honestly believed in the existence of those facts which, if they had existed, would have offered a justification under the statute, and honestly intended to put the law in force.

This was the proper direction to be given to the jury: *Booth v. Clive*, (10 C. B. 827); *Cox v. Reid*, (13 Q. B. 558); *Read v. Coker*, (13 C. B. 850); *Heath v. Brewer*, (15 C. B. N. S. 803). Whether the defendant had reasonable ground for that belief, that is, whether he judged reasonably, or not is a subordinate question, an ingredient in enabling the court to arrive at the conclusion as to his *bona fides*; for when the question is whether a man has or has not acted *bona fide*, the reasonableness of the ground of belief may be fit to be considered; and a party is entitled no notice of action, provided he has acted *bona fides* in the behalf that he is pursuing the statute, even although there may be no reasonable foundation for such belief; per Maule, J., (13 C. B. 863.)

In the case last mentioned, where an omnibus proprietor wrote upon the driver's license, that he had discharged the plaintiff from his employ for damaging his cab and not bringing home money, but the Statute, (6 & 7 Vic. ch. 86, secs. 21-24) did not confer this power upon the proprietor but only on a magistrate, upon the driver being properly brought before him, and an action was brought by the driver against the proprietor for defacing the license and writing defamatory matter upon it, the court held that the proprietor was not entitled to notice of action under that statute. Erle, C. J. said: "Can it be said that the defendant could honestly believe that he was acting under the authority of this section? The defendant could not honestly believe he was a magistrate, or that he could be justified in acting as a judge in his own case. There was no pretence for saying that he was acting, or could for a moment suppose he was acting, under the authority of the statute."

Now, by considering the necessity there was that there should have been an information in writing and under oath laid before the magistrate to confer upon him jurisdiction to issue his warrant for the arrest of the plaintiff, and by considering the nature of the direction which the judge ought to give to the jury in such a case, we shall be able to determine whether the defendant Ferguson was entitled to notice of action or not.

Can it be said, as Erle, C. J., expressed himself in the last case, that Ferguson could himself believe he was acting under the authority of the statute in the execution of his office or duty, by issuing the warrant to arrest the plaintiff, without any charge or complaint of any kind, verbal or otherwise, having been first made against the plaintiff? And I think we may also add, as was said in the same case, there was no pretence for saying that he was acting, or could for a moment suppose he was acting under the authority of the statute. He acted in a manner which the statute under no circumstances could justify; this was to "exceed his jurisdiction:" *Ratt v. Parkinson* (20 L. J. Mag. Ca. 208.)

The fact of the case shew not one single circumstance to remove the suspicion that the defendant was not a stranger

to the purpose which Collinson manifestly had in instigating and promoting this criminal proceeding against the plaintiff. There was no evidence of *bona fides*, nor room to conjecture it. There was nothing, in fact, to leave to the jury respecting it; but if there had been, no objection was taken to the mode in which the learned judge left the case to the jury.

As we find that Ferguson was not entitled to notice of action on the ground just stated, it is unnecessary to consider the other reason advanced by the plaintiff why notice of action was not necessary; namely, that the warrant was made out of the local jurisdiction of the magistrate. The cases of *Partridge v. Woodman* (1 B. & C. 12); *Arnold v. Dimsdale*, (2 E. & B. 580); and *Hughes v. Buckland* (15 M. & W. 346), are applicable to this part of the case; and from these cases it would seem, that, although Ferguson did make the warrant without the limits of the county for which he was a magistrate, he would not, therefore, necessarily forfeit his right to notice of action. And it is, also, unnecessary to consider the sufficiency of the notice: the first part of it relating to the trespass seems to be unquestionably bad, for not stating time and place.

As to that branch of the rule which relates to the application for a new trial, we should first dispose of such facts of it which we cannot entertain. They are contained in the 2nd, 4th, 6th and 7th objections above stated, and we decline to entertain them, because we see or know of nothing to shew us that the learned judge, as to the 4th objection, refused to receive any evidence which was admissible; for it could not be permitted to the defendant to prove the plaintiff guilty of a charge that had never been made against him, or of which he had never been convicted, even if such evidence be admitted to have been tendered to him; or, as to the 6th and 7th objections, that he misdirected the jury in the manner represented, and because, as to all the objections, we do not find in the notes of the learned judge that the defendants, or either of them, took any exception to the course which was pursued at the trial, or desired any other course to be taken. The defendants must, therefore, be precluded from now objecting to that whic

they did not object to at the proper time and before the proper authority.

We may also dispose at once of the 10th objection in the rule, as to the venue, because it is now of no moment, as, according to our opinion, Ferguson was not entitled to notice of action, and is not within the protection of the act.

The other questions raised by the remaining part of the rule are :

1st. That in a declaration containing a count in trespass, and another in case, the verdict, if it be general on both counts, is contrary to law. This is the first objection of the rule.

2nd. That the evidence did not establish any joint tort against the defendants, in which they could in law be, or were, in fact, jointly liable. This, we think, is the effect of the third, fifth, and eighth objections of the rule.

3rd. That the evidence did not justify a verdict against either of the defendants. This is the ninth objection of the rule.

Then as to the first of these three objections, that a general verdict is bad in law, when a count in trespass and in case are joined in the same declaration, no authority was cited in support of it; and we find the contrary to be the law in practice. Some of the cases cited in the argument were like the present, one count in trespass and the other in case, and general damages assessed.

In *Preston v. Peeke* (1 E. B. & E. 336), a record was received in evidence in which the first count was in trespass, the second for the wrongful sale of a distress, and the third for distraining when no rent was in arrear, and general damages had been assessed; and it was held that the parties could shew, as a matter of fact, how much of the damages had been assessed on one count and how much on the others; but no kind of exception was taken to the legal effect of the general finding on all the counts.

As to the second objection, we are clearly of opinion against it: we think the evidence did justify a verdict against both the defendants.

The chief objection, next to that which was taken to the notice, was the 3rd,—that the evidence did not establish any

tort against the defendants for which they could, either in law or in fact, be jointly liable.

The evidence did establish that Collinson procured the warrant to be issued by his co-defendant Ferguson, and that they both knew there was no complaint or charge made by Russel to justify the making for the warrant. The warrant was given by Ferguson to Collinson that the plaintiff might be arrested upon it, and the plaintiff was accordingly arrested, and arrested, as it has turned out, illegally and without any colour of right; yet this arrest would not have been made but for Ferguson's act. It is of no matter that this arrest took place in the county of Leeds, and under the authority of another magistrate, by his backing the warrant; for the arrest is, nevertheless, wrongful, not from the backing, but from the prior illegal proceedings of the defendants. The backing was not strictly the authority to arrest: it was a proceeding which authorized the original warrant to be executed in the county of Leeds; and for such an arrest the defendant Ferguson is as much responsible, as if it had been made in his own county. It was made by him for the express purpose, as the warrant shews, and the evidence too, of its being executed. not in his own county, but in the county of Leeds, to authorize which he knew that the backing by a magistrate if that county would be necessary to be made.

Now, if the person who makes an illegal warrant and delivers it to another to be executed, can in law be joined in an action for the wrongful arrest which was made under it, with the person who made the arrest, or who specially procured it to be made, this objection must fail; for it specifically denies that this is the law; but it is too well established that all are principals in trespass: procuring, commanding, aiding, or assisting makes one a trespasser: *Barker v. Braham*, (3 Wils. 377).

It is upon this principle that the attorney and client, and landlord and bailiff, and magistrate and prosecutor, have been so frequently, and can be properly joined together, respectively, in the one action.

We are of the opinion that both of the defendants were, upon the evidence, rightly charged with the one and the

same wrongful act, the illegal arrest of the plaintiff under the warrant by which they are both connected with the arrest.

If it had appeared by the evidence that Ferguson was liable to a particular measure of damages on some special ground personal to himself, and that Collinson was liable upon some other ground, to a different measure of damages, it may be that the same general damages should not have been awarded against the two; and, perhaps, the jury should have assessed the damages severally, according to the degree of wrong or malice which was chargeable against each, leaving it to the plaintiff afterwards to deal with such a finding as he might be advised: *Clark v. Newsam*, (1 Exch, 131); *Gregory v. Cotterell* (17 Jur. 525, 1 E. & B. 360). The damages rendered we think to be quite applicable to both the defendants, and that there is no ground for complaint in this respect.

It appears what Collinson's purpose on this arrest of the plaintiff was: it does not clearly appear that Ferguson had the same purpose; and there is no conclusive evidence of concert between them. Perhaps, it might have been inferred; for there was some ground to suspect it; but we think that, as there was only one cause of action, and that that was the trespass, the plaintiff ought to be restricted to a verdict upon the first count only.

It is not necessary to say whether, in an action such as this, one of the defendants could have been convicted on the count in trespass, and the other on the count in case. These causes of action may be joined; the writ supposes the defendants to be jointly liable for all; yet there are not wanting authorities, that, in actions of tort, one defendant may be found guilty of committing an act at one time, and the other of an act at another time; or, one may be found guilty of one conversion, and another of a different conversion; or, one guilty of a part, and the rest of all.

The defendant's rule, we think, ought to be discharged.

Rule discharged.

THE CORPORATION OF THURLOW V. BOGART.

Trespass—Justification—Nonsuit—Evidence—New assignment.

The first count of the declaration alleged that defendant had wrongfully and injuriously cut away, removed and destroyed a bridge belonging to plaintiffs.

The second count alleged a highway between two townships, intercepted by a river, over which plaintiffs, in performance of their duty, had, at large cost, built and maintained a bridge, which defendant, contriving to injure plaintiffs, had wrongfully cut down, destroyed, removed and carried away, thereby obstructing said highway; whereby plaintiffs had become liable to rebuild and had rebuilt the same, at large cost to themselves.

Defendant pleaded to both counts, Not guilty, and a denial that the bridge was plaintiffs' property; and for a third plea, to both counts, justification, alleging that the said river was and had always been a navigable stream at the place, &c., for conveyance of logs and timber, and defendant, with others, had been accustomed to use it for such purpose; that during certain freshets defendant was, with others, so engaged, and was obliged to pass that part of the river crossed by the bridge, which obstructed the navigation, and prevented the passage of defendant's timber; and whilst the bridge so obstructed the navigation, and though defendant used due care and skill, *said timber* ran against the same, and unavoidably *cut*, broke and destroyed the same, which were the injuries and trespasses complained of.

On these pleas plaintiffs took issue.

Defendant in effect succeeded upon his plea of justification, the jury having found a verdict for plaintiffs for \$20, for the mere removal by defendant's servants of a pier and stone belonging to the bridge, *on a day subsequent* to the destruction of the bridge by the timber, which had been justified.

Held, that defendant, having pleaded the general issue to the first and second counts, and a denial of plaintiffs' property in the bridge, was not entitled to a nonsuit, as the issues on these pleas had been properly found for the plaintiffs.

Held, also, (A. Wilson, J., *dissentiente*), that it was not necessary to *new-assign* the injury to the pier; for that, there being two counts in the declaration, and the injury in question not being part of one continuing trespass, but a distinct act done at another time after the destruction of the bridge, evidence thereof might be given under, and the verdict therefor sustained on, the second count of the declaration.

The evidence shewed that defendant's *servants* cut away a portion of the bridge on the first day that the timber collided with it, while the only cutting justified by the plea was that caused by *the timber*: *Quære*, whether the plea justified the whole trespass charged in the first count; for if not, *Semble*, that the verdict might be sustained on that count; but,

Quære, whether the first cutting away was so distinct an act of trespass as to have enabled plaintiffs to recover on that count, in the face of the finding of the jury as to the facts mentioned in the special plea.

The first count of the declaration alleged that defendant wrongfully and injuriously cut away, removed and destroyed a bridge belonging to the plaintiffs, known as and called "Latta's Bridge," to wit, the bridge across the river Moira, at Latta's Mill's, in the seventh concession of the township of Thurlow, on the line of road leading through the township of Thurlow to the townships of Tyendinaga and Hungerford.

The second count alleged a highway between the townships of Tyindenaga and Hungerford, through the seventh concession of the township of Thurlow, being a township road or road allowance in Thurlow, and that such line of road crossed the Moira river near Latta's Mills; and, that such road might be used, the plaintiffs, in performance of their duty, caused to be constructed, kept up and continued a bridge across the said river Moira (which said river crossed the line of road) to the said road, and so removed the interruption caused by such river, and thereby facilitated the use of the road to the inhabitants of the township and others; and the plaintiff, in erecting, constructing and keeping up said bridge, expended divers large sums of money belonging to the corporation of the said township of Thurlow; yet defendant, well knowing the premises, but contriving to injure plaintiffs, wrongfully and injuriously cut down, destroyed, removed, and carried away the said bridge, and thereby obstructed the said highway; by reason whereof plaintiffs became liable to repair the bridge, and to rebuild the same; and plaintiffs, in discharge of such duty, paid and expended, in building and reconstructing such bridge, divers large sums of money; and by reason of the premises plaintiffs were greatly damaged, to the extent of \$1,000.

The defendant pleaded to both counts, Not guilty, and that the bridge was not the property of the plaintiffs.

For a third plea to the first count, the defendant alleged that the Moira was and always had been, at the place where the bridge crossed the river, and above and below, a navigable river and public highway for the conveyance of saw-logs and lumber down the river to the Bay of Quinte, and the defendant and other persons had been accustomed to use the same for navigating lumber and saw-logs from places on the river above the bridge down the river to the Bay of Quinte, and in doing so, of necessity the saw-logs and timber had to pass that part of the bridge over which the bridge was erected; that in the spring of 1864, and during the spring freshets or floods in the river, defendant and others were lawfully navigating down the river from divers points above the bridge to the Bay of Quinte saw-logs and timber, and in doing so they had unavoidably to pass that part of the river over

which the bridge was erected; that at the said time when, &c., and whilst the defendant and others were so navigating the saw-logs and timber down the river, and at the place where the bridge crossed the river, the bridge blocked up, stopped and obstructed the navigation of the river, and prevented the passage of the said saw-logs and timber down the river past the place crossed by the bridge; and whilst the bridge so obstructed and stopped the navigation of the river as aforesaid, and although defendant in navigating his saw-logs and timber down the river and at the place where the bridge crossed the river, used due care, skill and diligence, the said saw-logs and timber, carried along by the water of the said river, ran and came against the said bridge, and, without any neglect or default on the part of the defendant, unavoidably cut, broke and destroyed the said bridge; and that the injuries in the said plea mentioned were the trespasses in the said count complained of.

A similar plea was pleaded to the second count.

On these pleas issue was joined.

The cause was taken down to trial before Mr. Justice Adam Wilson, at the last spring assizes for the county of Hastings.

The facts of the case, according to the evidence and the finding of the jury, so far as the same are material to be noticed, were as follows:

The defendant and other lumberers on the river Moira, in the spring of 1864, and during the high water, were bringing their saw-logs and lumber down the stream towards the bay of Quinte. When what is technically called the "drive" began, the number of logs in it and the quantity of timber was not larger than was usually brought down the river in a drive; but afterwards a boom which retained the lumber in the stream above, was broken, without any fault of defendant, and a further large quantity of logs and timber rushed on; and when the logs that had first been driven down were detained in the stream, forming what was called a "jam" the logs that escaped from the boom came on and mingled with those forming the jam, and increased the difficulty of keeping the river clear. The drive having reached a point near the plaintiffs' bridge, referred to in the declaration, where there

were piers placed in the river, near Latta's Mills, there formed a jam, and, with the force of the increasing body of logs and timber which kept coming down the river, gradually pressed on in a mass, and then gave way sufficiently to permit some portion of the logs and timber to rush against the bridge, which had the effect of shoving a part of the superstructure a short distance (two or three feet) off the lower part of one or two of the piers. The next day there was a further shove of the bridge by the weight of the jam, which caused the superstructure to be still further removed from the piers; and on the lower side of the bridge the stringers lay so close to the water, that the saw-logs could not pass without carrying them and a considerable portion of the bridge away. It then being considered that the destruction of the bridge was certain, defendant's servants cut away a portion of the stringers, and removed the floor, railing, and other parts of the bridge, taking ashore and saving as much of it as they could; but as soon as the jam gave way, the mass of logs rushed forward, and carried away a considerable part of the bridge. The logs continued to pass through; but on the afternoon of the second day, after this portion of the bridge had been cut away, and partly brought ashore and partly carried away, then what remained of one of the piers of the bridge the defendant's servants removed, to enable them to pass the logs and timber more conveniently.

The jury found a verdict for the plaintiffs for \$20, for the removal of the one pier and the stone from it, after the bridge had been taken down: they in effect found that the defendant was not liable for the injury to the bridge, which resulted in its being taken down and carried away, the learned judge having left it to them to say whether the defendant had been guilty of negligence in any way, either in driving the logs down the river, securing the booms, or in removing the bridge; and they found in effect as mentioned above.

At the close of the plaintiffs' case the defendant's counsel moved for a nonsuit on the following, amongst other grounds: that the special pleas justified the injury caused by the timber coming against the bridge; that the evidence sustained

this ; and that beyond the injury done by the timber plaintiffs could not recover, for there was no *new assignment*.

The plaintiffs' counsel contended that no new assignment was necessary ; for the plea was, that " the saw-logs and timber, carried along by the water, came against the bridge without any neglect of defendant, and unavoidable broke and destroyed the bridge," &c.; that the real cause of complaint, according to the evidence, was, that it was not done in this way, but by the defendant's men cutting the bridge away with axes, &c.

The learned judge was inclined to think that a new assignment was necessary ; but he allowed the case to go on, giving the defendant leave to move in term either for reduction of the damages, if damages should be given against him for a greater amount than \$40, and for both kinds of injury ; or, if damages should only be for the cutting with axes, then to enter a verdict generally for the defendant.

The jury found for the plaintiffs, with \$20 damages for the removal of one pier and the stone from it, after the bridge was taken down.

In Easter Term last, *Holden* obtained a rule *nisi* to enter a nonsuit for the defendant, pursuant to leave reserved, on the grounds :—

1. That the facts stated in the special plea of defendant, justifying the injuries complained of in the first and second counts of the declaration, having been found in favour of the defendant, and the plaintiffs having only traversed those pleas, the plaintiffs could not recover in the action, as they had not new assigned for the causes of action in respect of which damages were found by the jury.

2. That the pleas of the defendant to the first and second counts of the declaration justified the damages complained of in those counts, by the coming of the defendant's logs against the plaintiff's bridge as set out in the pleas ; that the jury by their verdict in fact found that the evidence sustained the defendant's pleas justifying the damages ; and if the plaintiffs sought to recover damages in this action beyond those justifying by defendant's pleas, they should have new assigned the causes of action in respect of which they sought to recover, and should not have joined issue

only upon the pleas; the jury having only given damages for causes of action beyond those justified by the defendant.

During the present Term *A. Diamond* shewed cause.—There must be a verdict for plaintiffs on the issue denying plaintiffs' property in the bridge. The causes of action stated in the declaration are divisible, and there are two counts in the declaration, so that the pleas of defendant may cover the ground of complaint in one court, but not that in the other: *Wilson v. Keys* 1 V. K. (15 C. P.) 32; *Glover v. Dixon*, 9 Ex. 158; *Robertson v. Gentelet*, 16 M. & W. 289, 300.

J. Bell, contra.—The facts clearly shew the necessity of the new assignment, for the jury found for defendant all the material facts of the pleas, which covered all the allegations of the declaration, and the only trespass which the jury found against him and for plaintiffs was committed some days after the destruction of the bridge, and, if plaintiffs were proceeding for that, they ought to have new assigned, in order to have given defendant an opportunity of either confessing or justifying that subsequent act; but defendant has had no opportunity of doing this, and hence the necessity for plaintiffs' new assigning: *Stephens on Pleadings*, 6 ed. 186, 190, note 34, p. 406; *Bullen & Leake's Precedents*, 2 ed. 553, 554, and cases referred to in note *a*; *Lambert v. Hudson*, 1 Bing. 317; *Bracegirdle v. Peacock*, 8 Q. B. 174; *Webber v. Sparks*, 10 M. & W. 485: 1 Wm. Saunders, 299 *b*, note *c*.

RICHARDS, C. J.—As the defendants have pleaded the general issue to the first and second counts of the declaration, and also pleas denying the plaintiff's property in the bridge, there can be no nonsuit; for the issues on these pleas seem properly found for the plaintiffs, and no exception is taken to the verdict on these issues: it does not appear from the notes of the learned judge, that leave was given to enter a nonsuit, but rather to enter a verdict for the defendant on his special pleas to the first and second counts.

Then, as to the trifling verdict found for the plaintiffs: if a nonsuit was entered or a new trial granted, there is no

reason to doubt that, in another action or trial, plaintiffs might recover as large a verdict as they now have. The principal contest, therefore, that now remains in the action is the costs ; and it is not desirable to send the case down again for trial if we can possibly avoid it.

The defendant contends that the plaintiff should have new assigned, setting out the excess in relation to what was done in destroying the piers after the bridge was destroyed ; and not having done so, the finding of the jury on the special pleas for the defendant prevents the plaintiff recovering in this action for that particular wrong, which was done after the one which was justified in the pleas, and committed on a different day, though the jury found for the plaintiffs on the general issue as to both counts.

If there were not two counts in the declaration, then, I suppose the reasoning of the defendant is correct, and would be sustained by authority. There being two counts in the declaration, and the trespass not one continuing trespass, but acts done on different days, the verdict may be sustained for the plaintiffs on the second count, for the injury which was not justified or excused.

In *Lambert v. Hodgson*, (1 Bing. 317,) the first count was for trespass, assaulting and compelling plaintiff to go from Bishop Auckland to Stockton, and there imprisoning and detaining him without reasonable cause for, to wit, three days. The second count was for assaulting and compelling him to go with defendants to divers places, and there imprisoning and detaining him in prison, without reasonable cause, for divers, to wit, three days.

It appeared one of the defendants was bail for plaintiff in an action, and seized him to render him to the custody of the marshal, in discharge of his recognizance, and took him to Stockton, where the plaintiff in the original action lived, because he was desirous of settling the action with him. Plaintiff was detained there until he settled then original action, and was discharged from the suit.

It appeared on the trial that defendant, in addition to detaining plaintiff at Stockton until he settled the original action, detained him an hour longer, until he gave defendant, after resisting the demand, a promissory note for the

amount of the expenses incurred in putting in bail and arresting him for the purpose of render in discharge of bail.

It was held that the act was all one continuing trespass, and as the arrest and taking of plaintiff to Stockton was justified, he ought to have new assigned, and not having done so the plaintiff was nonsuited. *It was further intimated, as there were two counts in the declaration, if the trespass had not been continuing, plaintiff might have recovered under the second count for the second trespass.*

Atkinson v. Matteson and others, (2 T. R. 172). This was an action for assault and false imprisonment against three defendants. The declaration contained two counts, to which all the defendants pleaded not guilty. Two of the defendants justified the arrest and imprisonment under mesne process. To this plaintiff new assigned, admitting the arrest under mesne process, but that after such arrest the plaintiff in that suit discharged him from arrest, and the defendants in the suit afterwards again imprisoned him. To this new assignment defendants pleaded not guilty.

In giving judgment, Buller, J., an able pleader, said : “ *As the declaration contains two counts, the plaintiff prima facie was at liberty to give evidence of two acts of imprisonment.* The defendants first pleaded the general issue; and then, as to the first count, they justify making the arrest under mesne process. To this the plaintiff new assigns, and that new assignment admits the legality of the arrest under the process, but charges that the defendant (Waite) after that arrest, by the consent of the plaintiff in the original action, discharged the plaintiff out of custody, and afterwards imprisoned him again. This is a very material allegation, because it depends on the discharge being with the consent of the original plaintiff. Then how does this bear on the second? The plaintiff has agreed by his new assignment that he did not intend to go for that arrest which was under the writ; therefore, he has precluded himself from giving evidence of that on the trial. *It is true that if there were, in fact, two imprisonments, and the plaintiff had not new assigned, as he has done here, he might have given evidence of both at the trial; but, there being only two imprisonments in*

fact, and one of them being abandoned on the record, the plaintiff could not have recourse to the second count, for he cannot avail himself of one and the same act of imprisonment, both at the new assignment and on the second count. * * * *If the plaintiff could have proved two imprisonments besides that which he has waived on the record, he might have done it as the pleadings now stand; but there was but one imprisonment besides that which he has waived, and that one is subject to a new assignment. therefore, there is no evidence of any imprisonment on which he could recover on the second count: thus it stands on the pleadings."*

In the case before us, the plaintiffs proved the first act of trespass by cutting away, removing and destroying the larger portion of the bridge, the principal injury being caused by the pressure of the logs against it, and the whole being a continuous act. This the defendant justified by his plea. Then, under the second count, the plaintiffs proved another trespass subsequent thereto, on another day, by cutting away and removing another part of the bridge, viz., a portion of one of the piers, This the defendant, by the finding of the jury, failed to justify, and for that second trespass the damages were assessed against the defendant at twenty dollars. It may be contended that the pier destroyed after the destruction of the bridge could not properly be described as a bridge, and, therefore, the injury described in the second count of the declaration was not proven as laid. But no objection of that kind was taken at the trial, and if it had been taken, the record might have been amended so as to meet the objection.

There is another ground on which the finding of the jury might be sustained, if it can properly be said that the plea to the first count does not justify the whole trespass as set out in the count. It is therein alleged that the defendant cut away, removed and destroyed the bridge.

The plea alleges that the saw-logs and timber, carried along by the water of the river, ran and came against the bridge, and unavoidably cut, broke and destroyed the said bridge. The evidence shewed that the defendant's servants actually cut away a portion of the bridge, and the only

cutting justified by the plea is that caused by the logs and timber.

In *Bush v. Parker et al.*, (1 Bing. N. C. 72,) the plaintiff in the first count declared for assaulting the plaintiff, seizing and laying hold of him, pulling and dragging him about, striking him many violent blows, forcing him out of a field into and through a pond, and then imprisoning him. The second count was for assault and imprisonment.

The defendants pleaded, first, not guilty; then, as assistants of one of the defendants, justified the assaulting, seizing and laying hold of the plaintiff, and a little pulling and dragging him about, on the ground that the plaintiff was unlawfully in a close of (Powell) one of the defendants, and refused to go out when civilly requested. The jury found two of the defendant guilty on the general issue, with £5 damages, and for the defendants on the residue of the record. It was moved to enter a verdict for the two defendants, notwithstanding the verdict against them on the general issue, on the ground that the dragging through the pond, which was not adverted to in the pleas of justification was only a matter of aggravation, the gist of the matter being the assault and battery, which were covered by the pleas of justification. The rule was discharged, the court considering that the dragging through the pond was a distinct trespass that had not been justified by the plea.

I am not prepared to decide that the cutting away of the bridge on the first occasion was so distinct an act of trespass as to enable the plaintiffs to recover on the first count, notwithstanding the finding of the jury as to the facts mentioned in the special plea. I have referred to it to show that we have not everlooked that view of the case; but we think it better to rest our decision on the other ground, that there was a distinct act of trespass proven, which took place after the destruction of the superstructure of the bridge, at another time, and which could properly be given in evidence under the second count of the declaration.

The rule will be absolute to enter a verdict for the defendant on the issue to the third plea to the first count: the rest of the rule will be discharged.

A. WILSON, J.—The plaintiffs, by *joining issue*, have alleged by a compendious form of *de injuria*, as it has been called, that the defendant of his own wrong, and without the cause alleged, committed the trespasses in the declaration mentioned.

To understand the effect of this issue, we have to consider what is *the cause alleged* by the defendant in his pleas. It is that the river has a highway for navigating logs and timber down it; that the bridge obstructed this use of the river by the defendant; and that, by reason of such obstruction, the logs and timber which the defendant was navigating caused the injury.

The plaintiffs answer to this that the bridge was not an obstruction, that the river was not a highway, and that the injury was not occasioned by the logs and timber in the use of the river by the defendant, as he has alleged.

There are two counts in the declaration, so that the plaintiffs were at liberty to show two trespasses by the defendant.

The defendant has undertaken to show that the two trespasses were occasioned in the manner and under the circumstances stated in his pleas.

The question is whether he has done so. This depends upon what the trespasses were.

The facts are, that by the concussion of the logs on one day the bridge was injured and somewhat removed from one or two of the piers; that on the following day the bridge was still futher injured and shoved, so that a material portion of it was entirely off the piers and rested upon the water. After this, in order to prevent the bridge from being carried away by the water, and after a consultation among a great many of the neighbors and others than present on the spot, the defendants' men, who were by, cut away with axes some parts of the bridge, and brought as much ashore as they could; and on the day after this, again, the defendant's men cut away one of the piers, and threw the stone out of it, to give the jam relief, and to prevent the adjoining land from being overflowed.

Here then are four distinct acts, yet all connected with the same transaction; two of them caused by the lumber and logs, and two of them immediately done by the defendant.

The defendant has treated the two acts of trespass as being those which were done by the force and pressure of the timber. Now, if there were two such occurrences the defendant has answered them; if there were not two such occurrences, he has only answered one of them, and the plaintiffs will be entitled to recover for the other.

If, however, the plaintiffs meant to treat the shoving of the timber as one act of trespass, and the cutting away of the bridge or the pier by the defendant as the other, I am of opinion they should have new assigned, if the defendant could show to such acts as he has set up in his pleas, so as to have pointed the attention of the defendant to the particular act of which the plaintiffs were complaining. If they had done this, and had set out that the trespass complained of in the second count was, for that the defendant, after the jamming of the logs and timber against the bridge, did by his workmen and servants, by axes, crow-bars and other implements, and otherwise, cut, remove and carry away the bridge, the defendant might have pleaded, that the bridge was in great danger of being carried away by the flood, and would have been carried away, if the defendant had not taken the bridge to pieces and carried the same ashore for the use and benefit of the plaintiffs, doing no unnecessary damage to the same; and so the very point would have been tried. But, as it is, the defendant says, that while there were two such acts as he has pleaded to, the plaintiffs are changing their ground, or amplifying their cause of action, which they are not at liberty to do, and they are recovering for what was not in issue, and upon which, if it had been put in issue, he would have a good answer to. I think that it is as the defendant says—that there were two acts applicable to the facts of his pleas, and that the plaintiffs have recovered upon a different act, which should have been the subject of a new assignment; and that the finding, on these pleas, should have been for the defendant. I refer to the cases of *Penn v. Ward*, (5 Tyr. 975); *Bracegirdle v. Peacock* (8 Q. B. 174); and *Glover v. Dixon* (9 Ex. 158,) out of the numerous other cases which may also be consulted, as explaining the ground upon which my opinion is founded.

But I think at the same time, if the pleadings had been carried out in their precise form, the plaintiffs would still have been entitled to have succeeded on the trial; because the jury did find, that in cutting away the pier the act was in no way justified by the defendant, and this could have been eliminated by a new assignment, or by new assigning a second time if necessary.

It is the absence of this new assignment which, in my opinion, in strictness entitles the defendant to succeed.

J. WILSON, J., concurred with Richards, C. J.

BOND V. BOND.

Alternative or separable award—Validity.

A submission to arbitration, after receiving that certain difference had arisen between plaintiff and defendant respecting, among other matters, *the title* to a lot of land, referred to the matters *in dispute* to the arbitrament of certain parties therein named. The arbitrators awarded that, "as to the right and interest of the parties respectively" in the land, &c., defendant should pay the plaintiff \$400 in full compensation for improvements made by plaintiff, *and in full consideration and for the discharge of all his claims to and against the said land*, the said \$400 to be paid to defendant in three equal instalments, fixing the periods for the respective payments and directing how the payment of the second and third instalments should be secured; that as soon as the \$400 had been fully paid, or its payment secured as aforesaid, defendant should give up possession of the land to defendant.

The award then proceeded to provide, that if defendant should not pay the first instalment on the 15th of January, 1865, or should not secure the due payment of the second and third instalments, he (defendant) should, on said 15th of January, 1865, convey to plaintiff in fee all his right and title to the said land, and that plaintiff should, in consideration pay two several annuities—one of \$80 to defendant for life, and another of \$20 to defendant's wife, during coverture, for her separate use, with certain directions as to increasing his or her annuity, according as the one survived the other, and as to the occupying a house on the land free of rent, &c., &c.

Held that the latter alternative of the award, was in excess of the arbitrator's powers, as they were not authorized to make a bargain between the parties as to the terms on which the land should be sold by one to the other; and even if they were, they had no right to direct that a portion of the money, which was to be paid to defendant for it, should be appropriated to his wife without his consent; but,

Held, that a breach might be supported on the other alternative, on the ground that there was an express direction to be paid by a certain time and in a certain way, which had not been complied with; and, therefore.

Held, that the award was, in effect, and alternative award, and could be upheld and enforced as to that part which was capable of being performed; that, in effect, it was capable, the part which was good being capable of being retained and enforced, while that which was bad might be rejected.

Semble, that the award of \$400, "in full consideration and discharge of all plaintiff's claims to and against the land," shewed that the arbitrators had decided that plaintiff had no further title to the land, and that it belonged to the defendant.

The declaration stated that the defendant by his bond, dated 26th September, 1864, became bond to the plaintiff in \$1,000, to be paid by the defendant to the plaintiff, subject to the condition, that if the defendant should keep the award of arbitrators appointed under a deed of submission made between the parties, dated 24th of September, 1864, or if any umpire to be appointed by the arbitrators, then the bond should be void ; that as the deed in the condition of the bond mentioned, after reciting that certain disputes and differences had arisen between the parties in relation to the *right, title and interest* of each of them respectively in the south half of lot No. 7 in the 5th concession of Maryborough, containing 50 acres, being the land on which plaintiff and defendant both resided, and containing certain improvements thereon alleged to have been made by the plaintiff, and concerning the cultivation thereof, and the crops that had been raised thereon, whilst the plaintiff was working thereon ; and also concerning the live and dead stock thereon, as well as sundry matters of account between the parties, including an instalment of twenty dollars paid upon a certain hundred acres of land, and the price or value of the said land, and the interest of the defendant therein, together with the board and wages of the plaintiff and defendant, and their or either of their servants and labourers employed on the said land ; that it was described to refer the same and all other matters in difference between the parties to arbitration ;—they thereby mutually covenated to refer and did thereby refer their matters in dispute recited, and also all other matters in dispute between them, whether oral or written, the two indifferent persons residing not less than 10 miles from lot No. 7, who had not been before cognizant of the matters in dispute to them thereby referred, so as they should make and publish their award of and concerning the same, ready to be delivered to the parties, or either of them, on or before 20th of October then next, or such further days as to arbitrators should enlarge the time

to for making the award, not later than 1st of November then next, by writing endorsed on the indenture ; and the name of each arbitrator was to be endorsed on the indenture, and the two persons, whose names should be so indorsed, should be the ardirators, and should have power to act under the submission as if they had been named therein as the arbitrators of the ptrties respectively ; and the arbitrators might award, order, and determine what they should see fit to be done by either of the parties respecting the matter in difference, and might direct such conveyance to be made of the said lands and premises as the justice of the case might require ; and that the cost of the reference and award should be in the discertion of the arbitrrators ; and that the parties respectively had appointed David Davidson Hay and Samuel Shantz arbitrators : and that they by indorsement in the deed had enlarged the time for making their award to the 1st of November, 1864 ; and that plaintiff and defendant, by endorsement upon the deed under their hands and seals, consented to the futher enlargement of the time for making the award to the 4th of November, 1864 ; and that the arbitrators, having taken on themselves the burthen of the award, on the 1st of November, 1864, made and published their award of and concerning the several matters by the deed to them referred, and awarded as follow :

1st. As to the writ and interest of the parties respectively in south half of lot No. 7 in 5th concession of Maryborough, and the improvements, thereon made by the plaintiff, that defendant should pay to plaintiff \$400, in full compensation for all the said improvements, and in full consideration and for the discharge of all the claims of plaintiff to and against the said lands, the said sum of \$400 to be paid to plaintiff in three equal instalments, the first to be paid on 1st of January, 1865 ; the second, with interest on the whole remaining balance, on 15th of January, 1866 ; and the third with interast, on 15th of January 1867 ; the due payment of the second and third of such instalments to be secured by an instrument in writing, creating an effectual and permanent lien therefor upon the right, title and interest of defendant to and in the land ; and that for the better securing the said payments the said defendant should deposit

with John Webster Hancock, Esq., all evidence of title thereto then in his possession, or thereafter acquired, and the said evidence of title to remain so deposited until the payments were fully made; when and as soon as the said sum of \$400 should be paid, or its due payment secured as aforesaid, plaintiff should give up possession of the said land to defendant; but if defendant should not pay the first instalment thereof on or before the 15th of January, 1865, or should not secure the due payment of the second and third instalment as aforesaid, then defendant should, on 15th of January, by an instrument under his hand and seal, transfer and assign unto plaintiff, his heirs and assigns, all his right, title and interest in the land, and plaintiff should, in consideration, pay to several annuities amounting in the whole to \$100, as follows, : an annuity of \$80 to the defendant during his natural life, the first payment to be made on 15th of January, 1865, and succeeding payments on 15th of January in every year, and to the then wife of the defendant \$20 yearly, during coverture, at the days and times aforesaid, for her sole and separate use, free from all debts of her husband, and from his control or disposition without her consent; that if defendant should die leaving his then wife surviving, then plaintiff should pay her, in each year during her life, the annuity of \$60; but if she should die before her husband, the said sum of \$20 should be paid to him, and enlarge his annuity to \$100; and that during their joint lives and the life of the survivor, defendant and his wife should free of rent taxes or charges, occupy and use the house on the said land, on which they then lived, and the garden belonging thereto, and should have, also, without charge therefor, pasture for a horse and cow, and stable room for the same; and that, in further consideration of the transfer, plaintiff should pay a debt of defendant to one Henry S. Huber, amounting to \$150; and that the said several payments, matters and things so to be made and allowed by plaintiff to defendant and his wife should be secured to them by a declaration of trust to be by him executed on receipt of the transfer, and by a mortgage on the said land, whenever plaintiff should take out of the Crown Land office, or otherwise obtain a deed of the said

lands in his own name ; and that for the further and better securing the said payments, matters and things aforesaid, plaintiff should deposit with Mr. Hancocke all evidences of title to the land in his possession, or thereafter acquired until a mortgage should be duly delivered to the plaintiff as aforesaid.

2nd. That, as to the cultivation of the land and crops raised thereon, during the time plaintiff had been working the same, they awarded that neither of the parties had any just cause of complaint in relation thereto.

3rd. That, as to the live and dead stock on the said premises, the whole belonging to plaintiff and his brother, Wm. Bond, except an old plough, a fanning mill, one cow, one horse, and four sheep, which were the property of defendant and that plaintiff was entitled to remove the same, with the exeception above named, if the premises should be given up to defendant.

4th. That, as to the matters of account between the parties, as far as they could understand the same, the arbitrators thought that neither parties had any claim thereunder against the other, and they awarded accordingly ; that as to the \$20 paid by defendant at Stratford on a certin 100 acres of land in the township of Elora, it had been made to appear that the same had been refunded to him by his son Alexander, and was not then chargeable against plaintiff ; that as to the value of the said 100 acres of land, and the interest therein of the said defendant, that defendant had no interest therein, nor any claim to any part of its value ; that as to the wages and board of the parties and their servants, neither of the said parties had any claim on the other therefor ; that as to the other matters in difference, the decision already made, in their opinion, comprised them all, as far as they have been brought before them, or touched upon by the parties or witnesses ; that as to the costs of reference or award, that they should be borne equally, and that the same should be paid to Mr. Hancock within one month ; and, lastly, that the money awarded to be paid, and the several things awarded and directed to be done by or with regard to the parties to the reference, should respectively be paid, received, done, accepted and taken as and for full satisfaction and discharge, and

as a final end and determination of the matters in difference between the parties.

Breach.—1st. That defendant had not paid the \$400 awarded to be paid plaintiff; but, on the contrary, the first instalment of \$133 33 $\frac{1}{3}$ due on 15th January, 1865, had not been paid to plaintiff. 2nd. That defendant had not secured the payment of the 2nd and 3rd instalment of the \$400, nor but had neglected and refused to do so. 3rd. That although defendant had not paid the first instalment of the \$400, nor secured the other two instalments by 15th of January, 1865, he, defendant, had not on 15th January, nor had he since, by an instrument under his hand and seal, transferred to plaintiff, his heirs and assigns, all defendant's right, title and interest in said half of lot No. 7, in 3rd concession Maryborough; that the plaintiff had been and was ready and willing to perform the several considerations and conditions in the award in that behalf mentioned and directed; by reason whereof the said bond had become forfeited, and an action had accrued to the plaintiff, to demand from defendant the said sum of \$1000; yet defendant had not paid the same and the plaintiff claimed \$1000.

Judgment by *nil dicit* was signed against defendant, with an inquiry of damages.

The case was taken down for the assessment of damages at the last assizes for the County of Oxford held before Mr. Justice HAGARTY

No evidence was given.

It appeared to the learned Judge, on reading the award, that if the defendant did not pay the \$400 at the stipulated time, plaintiff's claim ceased, and he would get the land subject to certain annuities. He allowed an assessment of damages on each breach, and left it to the court to decide whether that could be upheld. There was therefore, a verdict for the plaintiff for debt one thousand dollars, and damages assessed on each breach at 1s., subject to the opinion of the court.

In Easter Term last, *McMichael*, for the defendant, obtained a rule *nisi* to arrest the judgment, because the declaration shewed no valid award, the award set out therein being bad on the following grounds:—

1st. The arbitrators exceeded their authority in directing

the manner in which the land therein mentioned should be held, and directed charges and payments to people on the same other than to the parties to the award.

2nd. Because the award named several alternatives and consequences resulting therefrom.

3rd. Because it did not make the defendant liable either to pay any sum of money or to fulfil any duty, but left the same at his option, and the non-fulfilment or non-payment was no breach of said bond or disobedience of the award.

4th. Because the said ward was uncertain and in the alternative, and no certain breaches were or could be assigned in the declaration.

During the same term, *A. Crooks, Q. C.*, for the plaintiff also took out a rule *nisi* for a new assessment of damages, upon the ground that the plaintiff was in law entitled to assess on new breaches substantial damages, to the extent, in all, of the \$400 directed by the award to be paid by the defendant to the plaintiff, in respect of the parcel of land mentioned in the declaration; and upon the ground that the learned judge, who tried the cause, misdirected the jury, in directing them to assess nominal damages merely.

Both rules were enlarged until Trinity Term last, when *Alister Clarke*, for the plaintiff, shewed cause to the defendant's rule, and supported the rule obtained on behalf of the plaintiff. The first direction of the award is positive and certain, that the defendant shall pay the plaintiff \$400. It is not at his option to do so, or convey the land to plaintiff; the proper interpretation of the award is, that, in default of his paying the money, he shall convey the land. In this view the award is good, and a proper breach can be assigned.

But if the second alternative be doubtful, it may be rejected and the award be held good as to the award of the \$400, which is clear and precise.

There is no ground of objection taken in the rule to the award being bad for want of finality, and that is the ground on which conditional awards are held to be bad.

Courts now invariably sustain an award when they can do so, and this may be sustained as to parts which are good, and the rest neglected: *Russell on Awards*, ed. of 1864,

pp. 404, 419, 266, 268, 312 ; *Baily v. Edinburgh Oil Gas Company*, 3 C. & F. 639.

McMichael, contra.—The arbitrators had power to award as to the ownership and the value of the lot, and to order conveyances. They do not say in whom the title is, and, therefore, they have failed to decide that point.

If the award had closed at the part which directs the conveyance and the securing the payments by mortgage, it might have been good. It is not so, because the part of the award which follows shews that an option was left to the defendant to pay or not as he liked ; and the language when properly interpreted, means that. The paragraph begins, “*But if Thomas G. (the defendant) shall not pay, then he shall convey the land to plaintiff, and the plaintiff shall make provision for the defendant and his wife receiving annuities, with houses to live in, with garden, pasture for cow,*” &c. The effect of this is to declare that plaintiff shall purchase the land from defendant. The arbitrators had no power under the submission to do this, or to award how the houses on the land were to be occupied, and how the land, to be sold by their direction, was to be paid for : *Carthew*, 187 ; *Russell on Awards*, 266 ; *In re Duke of Beaufort*, 8 C. B. N. S. 156.

RICHARDS, C. J., delivered the judgment of the court.

After giving the case my best consideration, I have arrived at the conclusion that the award may be upheld and enforced in this view, that it is in effect an award in the alternative, and one of the alternatives, the latter one, not being binding on the parties, the other can be performed and is in force.

The award as to the right and interest of the parties in the south half of Lot 7 in fifth concession, and the improvements made thereon by plaintiff is, “that the defendant do pay to the plaintiff \$400 in full compensation, and the mode and time of payment, and manner of securing the payment, are pointed out. This is “in full consideration for plaintiff's improvements, and for all his claims to and against the lands.” Then follows the other alternative : “But if the defendant shall not pay the first instalment of the \$400, or shall not secure the payment of the other instalments by

the 15th of January, 1865," then defendant shall transfer and assign the lot to George, and shall get an annuity therefor, &c., &c.

Now this latter alternative seems to me to be beyond the powers of the arbitrators. They were not authorised to make the terms of a bargain between the parties on which the land should be sold by one to the other; and if they were, as to the amount that was to be received for it, they had no right to direct money that was payable to the defendant, to be paid to his wife without his assent. It is true, when a party to the reference owes a debt to a third person, the arbitrators may direct that the payment of that debt shall be considered as a payment to the party; but no case goes so far as to hold, that awarding an annuity to a man's wife without his consent is a proper appropriation of the money due to the man himself. I fear we cannot sustain that portion of the award, which directs the conveyance of the land by the defendant to the plaintiff.

As to the other alternative, a breach on that may be supported on the ground, that there is an express direction to pay by a certain time, and in a certain way, and that has not been done.

I think the case of *Oldfield v. Wilmer*, (1 Leon. 140-304,) referred to in Russell on Awards, 271, in an authority in favour of the view suggested, that the first alternative may be enforced. In that case the award was, that the defendant should pay the plaintiff £100 on a certain day, *or* should find two sureties to be bound with him to the plaintiff to pay the £100, by £20 a year until the whole should be paid.

The award was held good as to the former part, but void as to the latter; and did not even give the defendant the liberty of electing whether he would pay the £100 at once, or find the sureties to secure the yearly instalments.

It was urged on the argument that the arbitrators had not decided in whom the title to the half of lot No. 7, in the fifth concession was, and, therefore, the award was bad for want of finality. This objection does not seem to have been taken in the rule; and, if it had been, I apprehend that when the arbitrators awarded the plaintiff \$400 in (amongst other things) full consideration and discharge of

all his claims to and against the land, that would shew that he had no further claim to the land, and, as far as the arbitrators were concerned, it belonged to the defendant.

The defendant's rule will be discharged with costs. Rule absolute to plaintiff to set aside assessment of damages and amend his declaration, and defendant to be at liberty to plead *de novo*, and plaintiff to pay defendant's costs of opposing his rule.

Rules accordingly.

RULES OF COURT.

IN THE COURT OF QUEEN'S BENCH AND COURT OF COMMON PLEAS.

REGULÆ GENERALES.

Trinity Term 29th Victoria.

The Rules of Court, under the head of "New Trial List," numbers One, Two, Three, Four, Five, Six, Seven, Eight, Ten, Eleven and Twelve, passed in Michaelmas Term 27th Victoria, shall be, from and after the first day of Michaelmas Term, next annulled, and the following Rules shall come into force and take effect upon and after the first day of Michaelmas Term next.

1. The party who obtains any rule *nisi* for a new trial, or for entering a non-suit or a verdict, or for increasing or reducing a verdict on leave reserved, may, on or after the fourth day, inclusive, after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

2. The party served with any such rule may, (if the same has not been already filed by the party who obtained the same) on or after the fifty day after the granting of the rule, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule.

3. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipitur* with such Clerk after which such Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The Clerk shall, immediately on the receipt of any rule or copy, under the first or second Rules, enter a memorandum thereof in a book to be kept for that purpose in the order in which the same shall be delivered to him, such memorandum to be according to the form following:—

—TERM, (YEAR).

Plaintiff's Name.	Defendant's Name.	Description of Rule.	When filed with the Clerk.	How disposed of.
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5. On the first Sunday the second Tuesday, and the second Friday of every Term, the Court of Queen's Bench, after going

through the Bar to her motions for rules *nisi* or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business; and on the first Friday, second Monday, and second Wednesday of every term, the Court of Common Pleas will, after going through the Bar to hear motions for rules *nisi* or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business. The causes to be heard each day to be those on the list as it stands opening of the Court.

6. Each Court, in its discretion, will hear by rule so entered when both parties are present and prepared to proceed.

7. If when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attends and applies to have it discharged, such rules may be discharged accordingly.

8. If the party called upon to shew cause does not appear when the rule is called on in its proper order, the Court will hear the other side *ex parte*, and dispose of the rule.

9. If neither parties appear, the rule may, in the discretion of the Court be treated as having lapsed, and be struck out of the Clerk's books.

10. In the absence of other business, the Courts may, in their discretion, hear Rules so entered on any other day during Term besides those mentioned in the fifth Rule, the parties to the Rule being presented and desirous to proceed.

11. Each Court will, on sufficient ground show upon affidavit enlarge a Rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall after the entry accordingly, and place the enlarged Rule at the foot of the list.

12. All Rules entered by the Clerk as aforesaid, which remain unheard at the end of any Term, shall be enlarged as to course, on filing a motion paper to that effect, to the following Term, and shall be forthwith re-entered in the Clerk's book, in the order in which they then stand, for hearing in the next ensuing Term.

13. The Court may nevertheless, in any case, if it shall see fit so to do, make any special rule or order, or give any special directions upon or with respect to any such Rule, or the entering, taking out, or service thereof, or with respect to any supposed lapse or abandonment thereof or otherwise, as it might have done before the passing of these or the rescinded Rules.

Dated 29th September, A. D. 1865.

(Signed)

WM. H. DRAPER, C. J.
WM. B. RICHARDS, C. J. C. P.
JOHN H. HAGARTY, J. Q. B.
JOS. C. MORRISON, J. Q. B.
ADAM WILSON, J. C. P.
JOHN WILSON, J. C. P.

DIGEST

OF

CASES REPORTED IN VOL. XV., BEGINNING MICHAEL-
MAS, 28 VIC., ENDING TRINITY TERM 29 VIC.

ABANDONMENT.

See FI. FA., 1.

—O—

ABSENT DEFENDANT.

The fact of a defendant being resident out of the jurisdiction no objection to a reference under Con. Stats. U. C. ch. 22, sec. 161.

—O—

ACCOMMODATION MAKER.

See PLEADING, 9.

—O—

ACCOUNT STATED.

Evidence.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

—O—

ACTION.

See ASSIGNMENT—EQUITABLE PLEADINGS, 1, 2—DIVISION COURTS 2—TITLE BY ESTOPPEL—COMMISSION TO TAKE EVIDENCE, 1—ARREST—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—PLEADING, 1, 7, 9, 11, 13—COSTS—LANDLORD AND TENANT, 2.

ADDING PARTIES AT TRIAL

Con. Stat. U. C. ch. 22, sec. 222 — Authority of Guardian to consent to infants being added—Con. Stat. U. C. ch. 74, sec. 5.

Held, on the authority of *Blake v. Done*, 7 H. & N. 465, that a judge at *nisi prius* has power, under sec. 222, Con. Stats. U. C. ch. 22, to amend by adding parties, where such amendment is necessary for the purpose of determining the real question in controversy.

Held, also, that the guardian of an infant, appointed under Con. Stats. U. C. ch. 74, has authority under sec. 5 of that act, to consent to the name of the infant being so added in a suit which seems to be for the latter's benefit.

Quare, whether such consent should be *in writing*. In this case the point not having been raised at the trial, *the court* refused to entertain the objection. *Ogilvie v. McRory*, 557.

—O—

ADMINISTRATION.

Sale of intestate's lands under fi. fa. against administrator of administratrix — Estoppel — Sta-

tute limitations—Con. Stats. U. C. ch. 73.

An administratrix of an administrator has no authority to act for, and cannot represent the intestate, but an administrator *de bonis non* must be appointed to the original estate; and a sale by the sheriff of lands belonging to the intestate under a *fi. fa.* issued on a judgment against the administrator or the administratrix of the intestate is nugatory, and will pass no estate to the purchase of the lands. But in this case, on ejectment by the plaintiffs, the sons-in-law and daughters of the intestate to recover, possession of lands sold under such circumstances, it having appeared that the former, being tenants for life of an estate of freehold in said lands, and so entitled to dispose of the same, and bind the lands to that extent, uncontrolled by their wives both by the common law, and according to the evidence, by *Con. Stats. U. C. ch. 73*, had concurred in and in fact suggested and urged the sale in question for their own benefit, even indicating the mode in which it should be effected; that the party, (a creditor of the estate of the intestate, the ancestor of the plaintiffs) for whose benefit the intended conveyance on such sale was made, had charged his position, and had assigned the judgment, under which the sale took place, for the benefit of one of the male plaintiffs, and at his request;—

Held, that these were acts constituting such an estoppel *in pais* as barred the male plaintiff, particularly after the lapse of nearly, if not quite, twenty years, from disputing the validity of said conveyance, and that the bar was not removed by their having joined

their wives with them in the action, in which the validity of such conveyance was questioned.

Semble, that there was no evidence of conduct on the part of the female plaintiff to establish an estoppel against them, and that on the death of their husbands the only estoppel created would cease to operate against them.

Held, also, that the Statute of Limitations would, after the expiration of more than twenty years from the accrual of the husband's right to make an entry or bring an action, operate as a bar, as long as the coverture lasted, to any action by husbands and wives jointly—*Ingalls et al. v. Reid*, 491.

—O—

ADMINISTRATOR.

Of administratrix does not represent first intestate.]—See ADMINISTRATION.

De bonis non.]—See ADMINISTRATION.

—O—

ADULTERY.

Evidence of, in an action of crim. con.]—See COMMISSION TO TAKE EVIDENCE, I.

—O—

AFFIDAVITS.

I. *Affidavit of merits proper form of—Must disclose defence, except in interpleader cases.*

The proper form of the general affidavit of merits is, that the defendant has “a good defence to the action on the merits.”

Held, therefore, that an affidavit by the attorney which stated that in his “opinion the defendants had a sure and certain defence legally and equitably” was insufficient.

Held, also, that on an application to set aside a verdict and

grant a new trial, on the ground of merits, the affidavit must disclose what the merits are.

But *held*, that in an interpleader issue it is not necessary to set out the merits inasmuch as the very issue itself discloses what the defendant's claim is. *Vidal v. Bank of Upper Canada*, 421.

Affidavit of bona fides, under Con. Stats. U. C. ch. 45, secs. 1, 2, sufficiently made by president of a corporation without the authority in writing necessary in case of an agent.] — See CHATTEL MORTGAGES.

See COMMISSION TO TAKE EVIDENCE. 1.

ALIENS.

Con. Stats. C. ch. 8, sec. 9—9 Geo. IV. ch. 21.

A., an alien, born in the United States, received a patent for land here in 1826, and in the same year went back to the States, where he died in 1855. Some of his children were born in the States, some here; but they all lived there, and they all brought ejectment.

Quære, whether those who were aliens could recover under *Con. Stats. C. ch. 8, sec. 9.*

Semble, that they could, for that that clause is not confined to aliens resident here.

Quære, whether under 9 Geo. IV. ch. 21, A, having obtained a patent from the crown, would be entitled to the benefit of that act, without proof that he had taken the oath of allegiance. *Leatherman et al. v. Trow*, 578.

ALLUSION

On subsequent trial to former verdict.]—See PARTNERS.

ALTERATION.

Of insured premises.] — See INSURANCE.

In entry of Verdict.] — See PARTNERS.

ALTERNATIVE AWARD.

See ARBITRATION AND AWARD.

AMBIGUITY.

See DEED.

AMENDMENT.

Of nisi prius record in ejectment by judge at trial.] — See IRREGULARITY.

See ADDING PARTIES AT TRIAL.

AMERICAN PROBATE.

Corroborative evidence of representative character of executor.] — See EVIDENCE, 1.

AMERICAN CURRENCY.

Notes payable in.] — See PLEADING, 6.

APPEAL.

See QUARTER SESSIONS.

ARREST.

Action against justice of the Peace for.] — See EVIDENCE, 2.

ARBITRATION AND AWARD.

Alternative or separable award—Validity.

A submission to arbitration, after reciting that certain differences had arisen between plaintiff and defendant respecting, among

other matters, *the title* to a lot of land, referred the matters *in dispute* to the arbitrament of certain parties therein named. The arbitrators awarded that, "as to the right and interest of the parties respectively" in the land, &c., defendant should pay to plaintiff \$400 in full compensation for improvements made by plaintiff *and in full consideration and for the discharge of all his claims to and against the said land*, the said \$400 to be paid to defendant in three equal instalments, fixing the periods for the respective payment and directing how the payments of the second and third instalments should be secured; that so soon as the \$400 had been fully paid, or its payment secured as aforesaid, plaintiff should give up possession of the land to defendant.

The award then proceeded to provide, that if defendant should not pay the first instalment on the 15th of January, 1865, or should not secure the due payment of the second and third instalment, he (defendant) should, on said 15th of January, 1865, convey to plaintiff in fee all his right and title to the said land, and that plaintiff should, in consideration, pay two several annuities—one of \$80 to defendant for life, and another of \$20 to defendant's wife, during coverture, for her separate use, with certain directions as to increasing his or her annuity, according as the one survived the other, and as to the occupying a house on the land free of rent, &c., &c.

Held, that the latter alternative of the award was in excess of the arbitrators' powers, as they were not authorized to make a bargain between the parties as to the terms on which the land should be sold by one to the other; and even if they were, they had no right to

direct that a portion of the money, which was to be paid to defendant for it, should be appropriated to his wife without his consent; but,

Held, that a bridge might be supported on the other alternative on the ground that there was an express direction to pay by a certain time and in a certain way, which had not been complied with; and, therefore,

Held, that the award was, in effect, an alternative award, and could be upheld and enforced as to that part which was capable of being performed; that, in effect, it was capable the part which retained and enforced, while that which was bad might be rejected.

Semble, that the award of \$400, "in full consideration and discharge of all plaintiff's claims to and against the land," shewed that the arbitrators had decided that plaintiff had no further title to the land, and that it belonged to defendant. *Bond v. Bond*, 613.

—o—

ARTICLED CLERK.

Attorney's clerk — Discharge from articles—Practice.

A clerk articulated to an attorney, who, during the continuance of the articles, absconds, will be discharged from his articles.

Delivery of a copy of the rule *nisi* to the town agent of the attorney, and leaving copies at his last place of residence and at his office, held sufficient service. *In the matter of Malcolm Ogilvie McGregor, an articulated clerk*, 54.

—o—

ASSIGNMENT.

Action against maker and four indorsers of a note—Payment by two indorsers — Assignment of

judgment under 26 Vic., ch. 45, secs. 2, 3.

G. made a promissory note to S. who indorsed it. DeG., D. and W. also indorsed it. B. discounted the note, which, not having been paid at maturity, was sued, and judgment and execution obtained against all the parties to it. W. satisfied the execution, whereupon G. and D. paid him, (he having been a mere accommodation endorser,) S. and DeG. contributing nothing towards the payment. G. and D. thereupon applied to B., under 26 Vic. ch. 45, secs. 2, 3, for an assignment to them of the judgment so obtained by him, in order to levy from S. and DeG. their share of the liability. This B. refused, S. and DeG. having informed him that by agreement they were to be relieved of liability.

Held, an application by G. and D. for an order to compel B. to assign to them the judgment, that on the authority of *Phillips v. Dickson*, 29 L. J. C. P. 223, decided under Imp. Act 19 and 20 Vic., ch. 97, sec. 5, which in this respect is the same as Can. Act, 26 Vic., ch. 45, secs. 2, 3, the court had no power to grant the order. *Brown v. Gossage et al.*, 20.

See PLEADING, 8 — EXCESSIVE DEMISE.

—O—

ATTESTATION.

Of a will, either under Statute of Frauds, or under Con. Stats. U. C. ch. 82, sec. 13, sufficient.]—See Will.

—O—

ATTORNEY.

Guilty of carelessness in conduct of proceedings, disallowed costs of unsuccessful application to set them aside.]—See IRREGULARITY.

ATTORNEY'S CLERK.

Will be discharged from his articles if attorney absconds.]—See ARTICLED CLERK.

—O—

AWARD.

In an action on an award it is only necessary to set out so much thereof as will support the plaintiff's case.]—See PLEADING, 13.

—O—

BAIL.

Refusal to take no evidence of authority to arrest.]—See EVIDENCE, 2.

—O—

BAILIFF.

Action against.]—See DIVISION COURTS, 2.

—O—

BALANCING OF RISKS.

See INSURANCE.

—O—

BENEFICIAL HOLDER (OF PROMISSORY NOTE).

Right to sue in name of representatives of payee.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

—O—

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note indorsed in blank—Action by payee against indorser.*

Held, J. Wilson, dissentiente, that the payee of a promissory note indorsed in blank cannot, by merely writing his name above that of the indorser, maintain an action as indorsee against the latter, unless he shews that he has received authority from the indorser so to do, with the express object of creating between them

the relationship, and consequent liability; of indorser and indorsee. *Robertson v. Hueback et al.*, 298.

2. *Promissory note — Payment, evidence of — Right of beneficial holder to sue in name of representatives of payee — Municipal corporations may take any rate of interest.*

Defendants made the note sued on payable to D. or bearer, for \$348 40, with interest at 15 per cent. The note was made to D. and delivered to him as Reeve of the township, for money loaned by the latter, and was left with S. the treasurer, for plaintiffs. Subsequently the defendant Moore gave his own note for \$278 payable to S. (but not to order), S. without authority from plaintiffs, giving up to him the former, the difference between the two notes being a loan to S. himself, though included in defendants' note. S. having died, his accounts with plaintiffs were adjusted by the latter with his surety, who was charged with the note sued on, which he arranged by giving the note for \$278 and his own note for \$70; and a balance for \$183 was, as agreed to by plaintiffs, paid by, and a receipt therefor given to him in full of plaintiffs' claim against S. After this settlement plaintiffs by a resolution in counsel recognized this note for \$278 as amongst their existing securities, thus shewing that they were aware of its having been received in substitution of the note sued on.

Held, that taking the whole transaction together there was such a ratification of the acts of S. by plaintiffs in the subsequent adjusting of his accounts with his surety that, coupled with the receipt of the note for \$278 with other notes and money in full satisfaction

of all claims on the note sued upon, it was evidence to go to the jury of the payment of this note under a plea of payment.

Held, also that the plaintiffs could enforce payment of the note for \$278 in the names of the representatives of S.

Held, also, that municipal corporations are not restricted any more than individuals, as to the rate of interest to be received upon monies loaned by them, but that they may take any rate of interest agreed upon. *The Corporation of North Gwillimbury v. Moore et al.* 445.

3. *Written agreement by parties severally promising to pay certain sums, a several promissory note.*

Defendant, with others, signed the following instrument, his subscription being \$100:

"We, the undersigned, do hereby severally promise and agree to pay to F. W. Thomas, Esq., (the plaintiff,) agent of the Bank of Montreal in Goderich, the sums set opposite our respective names for the purpose of building an Episcopal Church and rectory in the town of Goderich."

The declaration thereon alleged that in consideration that W. and others would promise defendant to pay the plaintiff certain specified sums, for the purpose, &c., and that plaintiff would pay \$100 for the same purpose, defendant promised to pay the plaintiff \$100 the same purpose, defendant promised to pay the plaintiff \$100 therefor; that W. and the others did promise and pay accordingly, and the plaintiff paid \$100, yet defendant had not paid.

At the trial the plaintiff's promise to contribute \$100 was not proved.

Held, that on this ground defendant was entitled to succeed, and

the judgment of the court below refusing a nonsuit was reserved; but,

Held, also, that the instrument declared on was the several promissory note of each subscriber; and as it seemed that the plaintiff was entitled to recover, though not upon these pleadings and evidence, a new trial was ordered on payment of costs. *Thomas v. Grace*, 462.

4. *Unstamped bills of exchange*—*Time of affixing double stamp*—*Account stated*—*Evidence*—*Bill payable in American currency*—*Damages*—*White v. Baker*, 1 V. K. 292, *followed*.

When a party becomes the holder of an unstamped bill of exchange he must, in order to make it valid in his hands, affix the double stamp to it *before* commencing an action upon it.

Per RICHARDS, C. J., that the holder of such a bill can only be considered safe by affixing the proper stamp at the time when in law he would be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter.

The view expressed in *Baxter v. Baynes*, 1 V. K. 237, as to the most convenient mode of raising the question of the invalidity of a bill for want of a stamp, (*i.e.* by a special plea,) adhered to. In this case, however, as no objection had been taken at the trial to the absence of a special plea, and express leave had been given to enter a non-suit, if the court should be of opinion that plaintiff was not entitled to recover on account of the bill not having been properly stamped in due time, and the case having been argued on that ground, the court did not consider it necessary to discuss the

question as to the property of such ground of defence being set up under the plea of non-acceptance.

Held, also that the bill of exchange was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor), as there was no privity between them; nor were certain letters which referred only to the bill, for if the letters was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated because there would in any event be no legal or valid consideration for the promise.

White v. Baker, 1 V. K. 292, followed as to the damages, in the shape of exchange, to which the holder of a bill is entitled against the acceptor.

Quære, whether an instrument, purporting to be a bill of exchange payable in New York "with current funds," if it mean other than lawful money of the United States, is a bill of exchange. *Stephens v. Berry*, 548.

See PLEADING, 5, 6, 9.

—O—

BOND,

To Crown by and on behalf of Deputy Postmaster.]—See SCIRE FACIAS.

By Obligor to convey by a day certain.]—See OBLIGOR.

To Sheriff.]—See PLEADINGS, 8

Form of declaration on, conditioned to perform award.]—See PLEADING, 13.

—O—

BREACH OF COVENANT FOR TITLE.

See TITLE BY ESTOPPEL.

BRIDGE.

Action for cutting away, &c.,
—See PLEADING, I.

—O—

CARRIAGE OF GOODS.

See RAILWAYS AND RAILWAY
COMPANIES.

—O—

CHAMBERS.

Renewal in Chambers of unsuccessful application to the court.]
—See PRACTICE.

—O—

CHATTEL MORTGAGES.

Chattel Mortgage to corporation
—*Affidavit of bona fides*—*Pressure* — *Fraudulent preference*—*Equities of case, after discussion thereof, left to jury.*

Held, Richards, C. J., *hesitante*. that the president, or other principal officer of a corporation, taking a chattel mortgage for and in the name of the corporation, does not act as its agent, but as principal in the exercise of the corporate powers of the institution; and, therefore, that the affidavit of *bona fides*, under Con. Stats. U. C. ch. 45, secs. 1 & 2 is sufficiently made by such officer without the authority in writing necessary under said act in the case of an agent.

Held, also that such a mortgage by an insolvent, or by one on the eve of insolvency, executed by the debtor under pressure by the creditor, as, for instance, a threat of a criminal prosecution, but given to secure a pre-existing debt, was not a fraudulent preference, under Con. Stats. U. C. ch. 26, sec. 18, the pressure used rebutting the presumption of a fraudulent intention on the part of the debtor to prefer the creditor. The *intent* with which the instru-

ment in giving being a question for the jury, the circumstances of pressure attending its execution ought not to be withdrawn from them.

Where both sides have addressed the jury on the *equities* of the case. it is no ground for a new trial that the judge refused to withhold these equities from the jury. *The Bank of Toronto v. McDougall*, 475.

—O—

CLEARING OF LAND.

Injury resulting from the clearing of land—Refusal to interfere with verdict of jury.

A man must exercise care and discretion as to the time and mode of clearing his land; and if his neighbour be injured by rashness or inconsiderateness on his part, he will be liable to him for the damage.

It is, however, always a question for the consideration of the jury, whether or not a man has exercised his own right to the injury of his neighbour; and where the case has gone fully to them, with all proper directions on the law by the presiding judge, their verdict will not be disturbed by the court, unless it is contrary to law, even though the evidence would fully have warranted a different finding. *Wilkins v. Row*, 325.

—O—

COLLATERAL SECURITY.

Not accounting for proceeds of notes given as collateral security.]
—See PRIVATE MEMORANDUM BOOK.

—O—

COMMISSION TO TAKE EVIDENCE.

1. *Action of crim. con.—Evidence—Proof of Jewish marriage—Commission to take evidence—Defective state of envelope enclos-*

ing—Indorsement of style of cause—Annexing evidence taken—Contractions in entitling of affidavits of execution—Return—Admissibility of evidence.

A commission enclosed in an envelope, which comes to hand with an opening not large enough to allow of the escape of the papers contained therein, is sufficiently close, under Con. Stats. U. C. ch. 32, sec. 21, to render it admissible in evidence.

Effect of the word "close" considered.

Such commission need not be endorsed with the style of the cause in which it is issued.

It is not necessary that the evidence taken thereunder should be annexed to the commission.

It is no objection to the affidavit of the execution that the contractions *plff.* and *deft.* are used in the entitling of it.

A commission should be so framed in its terms as to be binding upon all parties to be examined under it, particularly as to the mode of administering the requisite oaths, as, for instance, to Jews.

Semble, 1. An objection to a return to a commission, which states that the execution thereof will appear "by the schedules and papers annexed," while the examination and affidavit of due taking are not annexed, if such objection be either that the return is defective or that it is no return at all, may be fatal; but in such case, if the objection be merely that the return is separate from the schedule, it must fail. 2. That in all cases a return should be indorsed on the commission.

A party who joins in acting under a commission, which contains specific directions as to the

mode in which it is to be returned, cannot afterwards object that certain formalities prescribed by the statute, but not by the terms of the commission, have been omitted.

In an action of *crim. con.*, it is not necessary that direct evidence of adultery should be given; it is sufficient to prove proximate acts and circumstances.

Held, therefore, in this case, that the fact of the defendant having supplied the plaintiff's wife, while living apart from her husband, with a bedstead and mattress at her boarding-house; that he, an unmarried man, visited at her residence at all hours of the day; that he was in the habit of driving and walking with her; that he admitted he kept a woman; and that he wrote a telegram from her to the plaintiff, calling her by his own name;—were strong evidence of adultery having been committed by him with her.

Held, also, that a written contract was not essential to the validity of a Jewish marriage, which had been solemnized with all the usual forms and ceremonies of the Jewish service and faith; and that such a marriage was valid, though there existed in relation to it a written contract not produced. *Frank v. Carson*, 135.

2. *Commission to take evidence—Enclosure open at both ends—Admissibility in evidence—Mistake in style of cause fatal—New trial.*

A commission to take evidence, which is produced at the trial contained in an envelope open at both ends, though otherwise well secured, and under the hand and seal of the commissioner, is properly admitted in evidence, it appearing that it arrived at the Toronto post-office in that state,

and there being no suspicion of its having been tampered with by either of the parties interested.

Held, also, that it is always open to a party to explain to the satisfaction of the presiding judge how an enclosure of the kind became open, and that the reception of it in evidence being a matter resting very much with the judge, the court will not be disposed to interfere with him in the exercise of his discretion.

Held, also, that a mistake in the entitling of the cause in the commission, (the defendant having been styled *William* instead of *Samuel*,) was fatal to it; that the taking of the evidence under it was a void proceeding, and the evidence not entitled to be treated as binding, though taken under oath; and that the jury having probably been greatly influenced in their verdict by the evidence so taken, a new trial ought to be granted. *Graham v. Stewart*, 169.

—O—

COMMON LAW JUDGE.

Has no power, unless where given him by statute, to direct feigned issue to be tried by a jury.]—See FEIGNED ISSUE.

—O—

COMPENSATION.

For improvements.]—See LANDLORD AND TENANT, I.

—O—

COMPETENCY.

Of partner as a witness, when not a party to the record.]—See PARTNERSHIP.

—O—

COMPOSITION DEED.

Fraud.]—Where J. H., R. M. and F. H., had agreed to give their promissory notes to the creditors of

E. F., (who had already made an assignment for their benefit) in compensation for the debts of E. F. at 10s in the £, and for the benefit of the creditors had executed a deed to that effect, but in the expectation and faith that E. F. would receive back from the assignees one half of the stock of goods assigned by him, and that C. would receive the other half, he and E. F. thus becoming co-partners in the goods, and the goods were afterwards all delivered to C., with the knowledge and assent of E. F.

Held, that the deed of J. H., R. M., and F. H., could not be avoided on the ground of fraud, because there was subsequently a partial failure in the arrangement, on the faith of which they had made the deed.

If a deed be obtained by fraud, a person innocently taken under it for valuable consideration will be protected. *Matthewson et al. v. Henderson et al.*, 90.

—O—

CONDITIONS PRECEDENT.

To bringing of action against Division Court Bailiff and sureties.]—See DIVISION COURTS, 2.

—O—

CONDONATION.

Of wrongful distress, not established by receipt from bailiff by tenant of surplus of sale.]—See PLEADING, II.

—O—

CONDUCTOR (OF RAILWAY COMPANY.)

Wearing badge of office on hat or cap.]—See PLEADING, 14.

—O—

CONFESSIONS.

See CRIMINAL LAW, 3.

CONFIRMATION.

Of deed.]—See INFANT.

—O—

CONSIDERATION.

See EQUITABLE PLEADINGS, 2.

Contractions (in entitling of affidavit of execution).]—See COMMISSION TO TAKE EVIDENCE, 1.

—O—

CONVEYANCE.

See INSOLVENT—INFANT.

—O—

CONVICTION.

In averring a conviction it is not necessary to shew that complainant prayed the justice to proceed summarily.]—See PLEADING 10.

—O—

COSTS.

Action within jurisdiction of County Court—Absence of certificate—Scale of taxation—Verdict to govern.

Where a verdict is rendered in an action and for an amount within the jurisdiction of the County Court, the mere fact that the damages have been laid at a sum beyond such jurisdiction, does not entitle the plaintiff, without a certificate from the judge who tried the cause, to Superior Court costs.

In the absence of this certificate the master on taxation must be governed by the amount of the verdict recovered.

Quære, whether, if the claim in the declaration be *specifically* for an amount *beyond* the jurisdiction of the County Court, the master may not tax the plaintiff full costs even though the amount recovered be *within* the jurisdiction of the County Court. *Miller v. The*

Beaver Fire Mutual Insurance Co., 75.

New trial only granted on payment of, when party's damages appeared to be but \$100.]—See NEW TRIAL, 3.

See IRREGULARITY.

—O—

COUNTY COUNCIL.

Purchase by, of public roads from government.]—See PUBLIC ROADS.

—O—

COUNTY COURTS.

Victors in an action and for amount within jurisdiction of, does not carry full costs, merely because the damages have been laid at a sum beyond such jurisdiction.—See COSTS.

—O—

COVENANT.

Non avoidance of statutory covenant on behalf of Division Court bailiffs.]—See DIVISION COURTS, 2.

—O—

COVENANT FOR TITLE.

Action for breach of.]—See TITLE BY ESTOPPEL.

—O—

COVENANT TO PAY RENT.

See EQUITABLE PLEADINGS, 1.
—INTEREST, 3.

—O—

COVENANT TO DELIVER PEACEABLE POSSESSION.

See EQUITABLE PLEADINGS, 2.

—O—

COVENANT FOR QUIET ENJOYMENT.

See LANDLORD AND TENANT, 2.

CRIM. CON.

Evidence of.]—See COMMISSION TO TAKE EVIDENCE, I.

—O—

CRIMINAL LAW.

1, *Forgery—Order for money not addressed—Evidence—Con. Stats. C., ch. 94, s. 13.*

A Writing, *not addressed to any one*, may be on order for the payment of money within Con. Stats C. ch. 94, s. 13, if it be shewed by evidence for whom it was intended. In this case the order was for \$15, in favor of "bearer or R. R.," and purported to be signed by one "B." The prisoner in person presented it to M. representing himself to be the payee and a creditor of "B." *Held*, that it might fairly be inferred to have been intended for M.; and a conviction for forgery was sustained. *The Queen v. Parker*, 15.

2, *Conviction for wilfully and maliciously shooting with intent, &c.—New trial refused.*

On motion for a new trial by a prisoner convicted of wilfully and maliciously shooting with intent to kill and murder.

Held, following the principle laid down in *The Queen v. Chubb*, (14 U. C. C. P. 32,) that the court will not, in criminal cases, grant a new trial, unless the verdict is clearly wrong; even though the evidence on which a prisoner is convicted would equally justify his acquittal; for the jury are to judge of the preponderance of the evidence, and their finding will not be disturbed.

Held, also under the authority of *Scott v. Scott*, (9 L. T. N. S. 456,) that the discovery of new evidence, which amounts to nothing more than *corroborative* testimony, is no ground for granting a

new trial. *The Queen v. McIlroy*, 116.

3, *Confessions—Evidence on which receivable—Inducements to confess—Jury directed to disregard confession—Duty of judge in such cases—Practice.*

The prisoner was convicted of arson. His admission or confession was received in evidence on the testimony of the constable who said that the prisoner had been in a second time before the coroner he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducements being held out to him. There was also evidence that on the third day of his incarceration he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be sued against him, and not to say anything, unless he wished. He then made a second statement, and after an absence of a few minutes returned and made a full confession.

Held, that on these facts appearing, the statement made to the constable was *prima facie* receivable, and that the judge was well warranted in receiving as voluntary the confession made to the coroner after due warning by him.

Semble, however that, the more reasonable rule to adopt in such cases is, that, notwithstanding the caution of the magistrate, it is necessary in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him. But, in this case, it having afterwards appeared

that the prosecutor had offered direct inducements to the prisoner to confess.

Held, that if the judge was satisfied that the promise of favor thus held out had induced the confessions and continued to act upon the prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them.

Held, also, that if the judge suspected the confessions had been obtained by undue influence such suspicion should have been removed before he received the evidence.

It is a question for the judge whether or not the prisoner has been induced by undue influence to confess.

Semble, 1. That when the names of other prisoners are mentioned in the confession, the proper course is to read the names in full, but to direct the jury not to pay any attention to them. 2. That the withholding from the court the confessions made before the coroner will render the application for a new trial irregular.

It is not desirable to grant rules nisi for new trials in criminal cases where there is no probability of their being made absolute, inasmuch as it is calculated to excite expectations not likely to be realized, and to raise doubts as to the promptness and certainty of punishment. *The Queen v. Finkle*, 453.

—o—

DAMAGES.

Nominal.]—See TITLE BY ESTOPPEL.

On default of obligor to make title.]—See OBLIGOR OF BOND TO CONVEY ON A DAY CERTAIN.

Excessive.]—See TROVER.

Of holder of a bill against acceptor.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

—o—

DEDICATION.

Insufficient evidence of.]—See HIGHWAY.

—o—

DEED.

Deed to married woman—Possession and conveyance by husband—Livery of seisin—Evidence—Demand of possession—Ambiguity—Evidence—Estate in futuro.

A grant to a married woman of a life estate in land does not require the assent of her husband in order to pass the title to her; and unless he repudiate it in some way, both will be seised in her right of the estate so granted.

Possession is evidence of livery or seisin of land; and where there is evidence of possession accompanying and following a deed for upwards of thirty years, seisin may well be presumed.

A demand of possession is not necessary in ejectment, where the estate of the defendant has terminated by reason of the death of his grantor, the husband of the lessee for life.

Though a man has been in possession for twenty years of land granted to his wife for life, he does not thereby acquire an absolute title to the land; for he is merely seised with her, by operation of law of her estate therein, and any grant made by him will only pass an estate for his own life, *if his wife should so long live*; and if he predecease her, the right to possession will revert to her, and entitle her to maintain ejectment against his grantee.

The modern doctrine in interpreting the meaning of a grant

other instrument is, to ascertain the surrounding facts at the time the same was made. In this case, which was ejectment for a part of lot 41, in the 1st concession of the township of Colchester, the patentee of the whole lot granted to the plaintiff "all that parcel of land commonly known by part of lot No. 41, containing fifty acres," off the rear part of the lot on which it was proved, *he lived at the date of the deed*, being also himself described in the deed as of *the same place*. The grantee with her husband thereupon went into possession of the land, being that in question in the cause; and there was no evidence that the grantor owned any other lot 41.

Held, that the words in the deed, with the surrounding facts together with what followed immediately after its execution, were sufficient to shew with reasonable certainty that the land sued for passed by the grant; and that evidence of such facts was properly received at the trial.

In this case, also, the deed was dated the 27th of March, 1824, to hold from the 30th day of the same month.

Held, that though, under the authorities, it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good; and,

Semle, that the jury might probably have been asked, under the peculiar facts of the case, to presume one or both of these propositions in favor of the plaintiff, the grantee under the deed. *Nolan v. Fox*, 565.

Execution of deed by one partner for both.]—See PARTNERS.

—O—

DEFECTIVE APPLICATION.

See PRACTICE.

—O—

DEMAND OF POSSESSION.

See DEED—PLEADING, 3.

—O—

DEMISE.

See EXCESSIVE DEMISE.

—O—

DEPUTY POSTMASTER.

Bond to Crown by and on behalf of.]—See SCIRE FACIAS.

—O—

DIVISION COURTS.

1. *Jurisdiction—Interpleader—Title to land.*

The judge of a Division Court may, notwithstanding Con. Stats. U. C. ch. 19, sec. 54, sub-sec. 4, entertain an *interpleader* application to try the question of property in goods, even though the enquiry may involve the title to land. The judge *himself* must decide such application *without the aid of a jury*. *Munsie v. McKinley et al.* 50.

2. *Action against Division Court bailiff and sureties—Non-avoidance of statutory covenant—Conditions precedent to bringing of action—Pleading—Nonsuit—Con. Stats. U. C. ch. 19.*

Sec. 25 of ch. 19 Con. Stats. U. C. is directory, not mandatory.

Held, therefore, in this case, which was an action against a bailiff and his sureties for an excessive seizure by the former, and a sacrifice of plaintiff's goods, that

the fact of the sureties of a division court bailiff being non-residents of the county in which the bailiff's duties lay, did not avoid the covenant into which they had entered on his behalf, the provisions of the section in question being merely intended for the guidance of the judge as to the class and character of sureties to be required and approved of by him.

Held, also, that in an action against a bailiff of a Division Court for his own torts, the demand of perusal and of copy of warrant, under sec. 195 of ch. 19 Con. Stats. U. C., is not requisite, the same being only necessary in cases of "defect of jurisdiction or other irregularity in or appearing by the warrant," in order that the clerk and not the bailiff may be made liable.

Held, also, that in such an action as the present a bailiff is entitled to notice before suit brought, even though the proposed suit be upon the statutory covenant; that such action must be brought within six months; and that this defence may be raised under a plea of the general issue by statute.

Quære.—1st. Are the sureties of a Division Court Bailiff, in a joint action against principal and sureties, entitled, even under a special plea, to raise the defence of want of notice of action to themselves? 2nd. Can they in such an action plead the want of notice to bailiff in their own protection? 3rd. Can they, in an action against *themselves*, take advantage of the want of notice to the *bailiff*, or any other defence that would have been open to the latter? But

Held, in this case, that as the principal and sureties had been

joined in one action, and the recovery must, therefore be against all or none, the discharge of the principal involved that of the sureties. *Pearson v. Ruttan et al.*, 79.

Division Court Execution.]—*See* PLEADING, 12.

—O—

EJECTMENT.

Right to bring without demand.]—*See* PLEADING, 3.

New trial as to half of a lot of land.]—*See* NEW TRIAL, 2.

See EVIDENCE, 1.

—O—

EMBLEMENTS.

See PLEADING, 3.

—O—

ENROLLMENT.

See FI. FA., 3.

—O—

EQUITABLE PLEADINGS.

1. *Action on covenant to pay rent*—*Equitable plea*—*Demurrer*.

Declaration, that plaintiff by deed let to defendant a lot of land, situate, &c., to hold for 21 years from 1st June, 1854, at a rent payable half yearly, free from all taxes or other deductions, and defendant by said deed covenanted with plaintiff to pay him the same as aforesaid, yet five years of said rent and taxes are due and unpaid.

Plea, on equitable grounds, that said rent was reserved upon a demise of certain lands made by plaintiff and others to defendant by indenture, dated 24th May, 1854, and made between plaintiff of 1st part, J. C. and J. F. S., mortgagees of the lands amongst otherlands thereinafter mentioned

of the 2nd part, L. C., wife of plaintiff, of 3rd part, and defendant of the 4th part; whereby plaintiff and the other parties to said indenture, except defendant, pretended to demise to defendant said lands, in respect of which said rent was reserved, and which said premises were composed of, &c.; that plaintiff and the other parties to said indenture, other than defendant, claim and derive title to the said premises, and at the time of making said demise, claimed and derived title to same, under a conveyance thereof by one G. H. M. to plaintiff being an indenture of bargain and sale between said G. H. M. and plaintiff, dated 29th March, 1854, whereby said G. H. M. pretended to convey to plaintiff all said premises in fee, who afterwards pretended to convey certain interest in said premises to the other parties to said indenture, who joined in said demise to defendant. That upon the making of said demise, and before said conveyance by said G. H. M. plaintiff, and while said G. H. M. was seised in fee of said premises to wit, on 1st July, 1841, said G. H. M. *contracted and agreed with one H. G., now deceased, to sell and convey to him in fee a certain large portion of said demised premises, being all &c.. and said S. H. M. then contracted and agreed with said H. G., that he, said H. G., should have and retain possession of said last mentioned premises until said contract of purchase was performed by said H. G., on his part and that then he said G. H. M. would convey same to said H. G. and his heirs in fee; that thereupon, to wit, on said 1st July, 1841, said G. H. M., in pursuance of said contract, let said H. G. into possession of same, and said H. G. retained such pos-*

session until some time in 1843, when he died intestate, leaving H. G. his only son and heir at law, who thereupon entered into and retained possession, under said contract of purchase, until he also died intestate in 1859, whereupon one J. G., the mother of the said H. G., and as such the heir-at-law during her life of the said H. G. under said contract of purchase, entered into and retained possession of the same continually from the death of the son, H. G., until after the commencement of this suit; that such possession of said H. G., the son, and J. G., the mother, was of right under said contract, and that by reason thereof defendant did not and could not enter into the possession or hold or enjoy said last mentioned land so being parcel of said demised premises, or any part thereof; that, although defendant has always since the making said supposed demise been ready and desirous of entering into possession of said last mentioned land, of which plaintiff had due notice, yet that he has always been and still is kept out of the same by reason of said contract of sale, which bound said plaintiff and the others joining in said demise, as the assignees of said G. H. M., and thereby defendant has been wholly prevented from entering into and enjoying said portion of said demised lands, and from receiving the profits which would otherwise have accrued to him therefrom.

Held, on demurrer, plea bad. That at most it shewed only a parol demise, and that only as to part of the premises; that H. G. was merely tenant at will or at sufferance, and liable to be ejected by defendant; and that relief, if any, would only have been apportionate, and upon terms, in a

court of equity. *Crooks v. Dickson*, 23.

2. *Action for a breach of covenant to deliver peaceable possession of premises—Equitable plea—Demurrer—New assignment—Demurrer—Past consideration.*

In an action of covenant by lessee against lessor on a covenant in a lease under seal to deliver possession of the demised premises to plaintiff on 20th March, 1864, assigning as a breach that defendant had not delivered possession to plaintiff, and had deprived him of the use of the land and premises; defendant pleaded, on equitable grounds, that plaintiff by an agreement in writing executed contemporaneously with the lease, in consideration that defendant had leased to him the premises mentioned in the declaration, which were then in the possession of one J.Y., who had agreed to surrender possession by the said 20th March, agreed not to bring any claim or damage against defendant, if possession could not be obtained on the day as provided in the deed, averring that on 20th March Y. was and continued in possession of the premises and refused to deliver them up to defendant, who, consequently, could not obtain possession thereof on the said day and could not by reason thereof deliver possession on 20th March to plaintiff.

Plaintiff new assigned that he brought his action as well for the causes attempted to be justified as for not giving possession of the premises 21st March.

Held, on demurrer to both plea and new assignment, that the plea was bad, as a legal defence, for attempting to alter an instrument under seal by one merely in writing not under seal; as a legal and

equitable defence, for want of a good consideration, alleging, as it did, a past consideration as that on which the agreement was based. That if it was intended to be urged that the agreement was part of the instrument under seal, and executed contemporaneously with it, it was not so stated; if executed before the lease, and as part of the consideration for making the lease it was not so pleaded.

Held, also, that the new assignment was bad as enlarging the declaration. *Wilson v. Keys*, 32.

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EQUITIES OF CASE.

Leaving of to jury, after discussion, no ground for new trial.]
—See CHATTEL MORTGAGES.

ESTATE IN FUTURO.

See DEED.

ESTOPPEL.

See TITLE BY ESTOPPEL—ADMINISTRATION.

EVIDENCE.

1. *Ejectment against tenant of executor of the debtor—Title of executor—Denial by Tenant of landlord's title as executor, after judgment against the latter as such—American probate of will—Production in evidence of original judgment roll—Lease of Lands after delivery of fi. fa. to sheriff—Judgment by default, whether proof of fraud.*

In an action of ejectment, upon a sheriff's sale under a *fi. fa.* brought against the tenant or alleged tenant of the executor of the debtor, no evidence need be given of the title of the executor, or of his testator.

Such tenant cannot after judgment by default against his landlord, as executor, set up the defence that the latter was not executor.

An American Probate of the Will of the testator may be received as corroborative evidence of the representative character of the executor.

A judgment may be proved by the production of the roll containing the entry of it.

A lease of land made by the agent of an executor, after delivery to the sheriff of a *fi. fa.* lands against such executor, will only convey an interest subject to such *fi. fa.*

The suffering a judgment by default, in a case where a plea of the Statutes of Limitations would have been a bar to the action, is no proof of fraud in the defendant.

If such judgment be fraudulent, as giving a preference to one creditor over another, it can only be objected to on that ground by a creditor, and on, as in this case by the tenant of the executor. *Sloan et. al. v. Whalen*, 319.

2. *Action against a Justice of the Peace for arrest and imprisonment—Evidence, refusal to take bail—Nonsuit.*

Where the defendant, a Justice of the Peace, had laid an information before another magistrate against the plaintiff, who was thereupon arrested under the said magistrate's warrant, and on an examination was committed for trial for a further warrant issued by the same magistrate, which turned out to have been illegal or void, and subsequently imprisoned under it, the defendant and the other magistrate having refused to admit him to bail.

Held, in an action of trespass by the plaintiff against the defendant.

charging him with the arrest and imprisonment, that in the absences of any evidence that the defendant had directed the officer to take the plaintiff to prison, or had influenced the other magistrate in sending him there, or that the officer was present when the defendant and the other magistrate declined to take bail and said they would send the plaintiff to prison, or that he ever knew that the defendant had said anything about it, *the mere refusal*, by the defendant to admit the plaintiff to bail, was not evidence to go to the jury that the defendant authorized the illegal arrest and imprisonment of the plaintiff, and a nonsuit was, therefore, ordered to be entered. *McKinley v. Munsie*, 230.

See CRIMINAL LAW, 23—WILL—COMMISSION TO TAKE EVIDENCE, 1—HIGHWAY—TRESPASS—MEMORIAL—PLEADING, 12, 15,—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—DEED—NEW TRIAL, 4—MAGISTRATE—FI. FA., 3—JUSTICE OF THE PEACE.

—O—

EXCESSIVE DAMAGES.

See TROVER.

—O—

EXCESSIVE DEMISE.

Lease—Demise by lease beyond term created—Assignment.

Where lessee of land for five years demised the land for seven years.

Held, that the demise in question operated as an *assignment* of the original term, and conferred upon the original lessor, in respect of the privity of estate thus created, a right of action against the assignee of the term for the arrears of rent due under the original lease. *Selby v. Robinson*, 370.

EXCHANGE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4—PLEADING 6.

—O—

EXPECTING CAUSE TO BE REFERRED.

See NEW TRIAL, 1.

—O—

EXPIRATION OF WRIT.

See FI. FA., 1, 2.

—O—

EXTENSION OF TIME.

To indorser of Pro. Note.]—
See PLEADING, 9.

—O—

FEIGNED ISSUE.

Jurisdiction of common law judge—Refusal of court to grant a new trial, where issue directed by judge.

A common law judge has no power, unless where given him by statute to direct a feigned issue to be tried by a jury: the most he can do is to refer the parties to the full court for the required relief, or perhaps, to grant a summons returnable in court. As he cannot grant a new trial himself, so he cannot, by creating a proceeding of the kind, confer this jurisdiction upon the court, which will therefore refuse to interfere. *McLaughlin v. McLughlin*, 182.

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FI. FA.

1. *Lands—Seizure—Expiration of writ—abandonment—Return.*

The expiration of a *fi. fa.* lands before the intended day of sale, which has been regularly advertised, does not cause a cessation of the seizure, which the commencement of the advertisement is.

In this case, where lands had

been advertised under other writs, the plaintiff's writ of *fi. fa.* being at the time in the sheriff's hands.

Held, that although the sale under the writs so advertized neither took place nor was adjourned, yet that the plaintiff's writ operated upon the lands under the seizure by such advertisement and that the return of "lands on hand" to this writ after its expiry was, under the circumstances, the only return which could have been made; and further, that the sheriff might have proceeded at the plaintiff's suit without a *venditioni exponas* to sell the lands then in his hands.

Held, also that the non-adjournment of the sale advertised for 12th September, 1863, (which did not take place,) and the publication of an apparently independent notice in the following June, under the plaintiff's writ of *ven. ex.*, did not necessarily and conclusively constitute an abandonment of the seizure, which had been lawfully made under the former writs; although no positive rule could be laid down as to what would constitute an abandonment of lands once seized, this being a matter of fact which must rest very much upon intention. *Hall v. Goslee et. al.*, 101.

2. *Lands—Expiration—Renewal—Priority of writs.*

The day of the *teste*, of a writ of *fi. fa.* is inclusive; so that a writ issued on 16th May, 1861, will expire on the 16th May, 1862.

In this case, *Held*, that the writ which was issued 27th July, 1861 and had been renewed 22nd July, 1862, was entitled to prevail over a writ issued on the 16th May, 1861, but not renewed until the 16th May, 1862.

The law, is laid down in *Hamilton v. Beardmore*, (7 Gr. Chy. Rs. 286,) that the registration of a judgment recovered against the personal representative of a deceased person, does not bind lands which were of the deceased; and, also, that the omission to issue a *fi. fa* lands within a year from the registration of a judgment, prevents the judgment from operating as a lien upon the land from the date of registry,—recognized and applied. *Bank of Montreal v. Taylor*, 107.

3. Enrolment—Secondary Evidence—Practice.

It is not necessary that a writ of *fi. fa.*, which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence; and if lost and unenrolled, secondary evidence may be given of it.

Held, also, that the issuing of the writ of execution may be entered on the roll at any time, though no return may then have been made it. *Solus v. Donovan*, 121.

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FORFEITURE.

Of lease for non-payment of rent.]—See PLEADING, 3.

—O—

FORGERY.

See CRIMINAL LAW, 1.

—O—

FRAUD.

See COMPOSITION DEED.

—O—

FRAUDULENT PREFERENCE.

See CHATTEL MORTGAGES.

GUARDIAN OF INFANT.

Authority to consent to adding of at trial.]—See ADDING PARTIES AT TRIAL.

—O—

HIGHWAY.

Obstructing—Insufficient evidence of dedication.

Where the defendant was convicted under an indictment charging him with having obstructed a “highway” on evidence, which, as reported to the court, did not shew that the alleged highway had been established by a plan filed or signed by the owners of the adjoining lots, or by the general user of the public, it having been used by one or two persons only for a short time, or that any clearly defined portion of land had been marked off and used; but there appeared to have been merely an open space not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, &c., to the rear of the premises:—

Held, that there was not sufficient evidence to dedication to support the conviction, which was, therefore, ordered to be quashed. *The Queens v. Ouellette*, 260.

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HIRING AND SERVICE.

See PARTNERSHIP.

—O—

HUSBAND.

Possession and conveyance by, of his wife's land.]—See DEED.

—O—

IMPRISONMENT.

Action against Justice of the Peace for.]—See EVIDENCE, 2.

INCORPORATED COMPANY

Legality of sale by members of their personal interests in.]—See PLEADING, 4.

—O—

INDORSER.

Action by payee, as indorsee, against indorser of note indorsed in blank.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

Extension of time to indorser—See PLEADING, 9.

—O—

INDUCEMENTS.

Too Confess.]—See CRIMINAL LAW, 3.

—O—

INFANT.

Conveyance in fee by infant—Confirmation—Title by estoppel.

Where the defendant, during nonage, conveyed in fee, without title thereto, certain land, in pursuance of the "Act to facilitate the conveyance of Real Property," to the grantor of the plaintiff; and, though fifteen years had in the meantime elapsed since attaining his majority, took no steps to repudiate his deed, until he defended on this ground an action of ejectment brought against him to recover the land, a conveyance of which had in the interim, and after the conveyance to the plaintiff, been made to him (defendant) by the person entitled thereto: *Held*, that the defendant's deed was merely voidable, not void, and that being, therefore, good until avoided, it might be assumed, from the circumstances of the case, under the power given to the court to draw inferences of fact, that the defendant had confirmed the deed and that he could not now avoid it by setting up in this suit the

defence of infancy at the time of its execution, inasmuch as it had become confirmed before the action brought.

Grace v. Whitehead, (7 Grant, 591,) remarked upon.

Held, also, that the deed in question operated by way of estoppel, and that the title subsequently acquired by the defendant passed at once to the plaintiff.

Todd v. Cain, (16 U. C. R. 516,) and *Doe McGill v. Shea*, (2 U. C. Q. B. 483,) distinguished. —*Featherston v. McDonell*, 162.

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INFORMATION.

See MAGISTRATE.

—O—

INFORMATION OF INTRUSION.

See LAKES AND NAVIGABLE RIVERS.

—O—

INSOLVENT.

Sale or Conveyance by an insolvent—Bona fides of transfer—Con. Stats. U. C. ch. 26, sec. 18—13 Elizabeth, ch. 5, sec. 2.

A sale or conveyance of property made by an insolvent, though not in the ordinary course of trade without intent to defeat or delay creditors, or to give a preference, is valid; for the *intent* with which it was made must govern.

The last clause of sec. 18, ch. 26, Con. Stats. U. C., does not avoid all conveyances made by an insolvent which are not for the benefit of creditors, or which are not made in the ordinary course of trade to innocent purchasers; it merely excepts the cases therein mentioned from the operation of the antecedent portion of the section, but does not invalidate other transactions within the objects of the act.

In this case the execution debtors on the eve of insolvency, and after service upon them of the writ at the suit of the defendants (the execution creditors), sold their stock in trade to the plaintiff with the knowledge by the latter that they had been so sued, taking from plaintiff promissory notes payable in one, two, three and four years, for the purpose of dividing them ratably among their creditors. These notes were accordingly offered to and accepted by the several creditors of the debtors, with the exception of the defendants, who rejected them.

Held, that the jury were properly directed to support the sale to plaintiff, if they found that it had been made *bona fide* with intent to transfer the property to plaintiff, and was not colorable for the purpose of protecting it for the debtor, even though the effect of such sale might be to prevent the defendants from seizing the property under their execution.

Held, also, that save as to the provisions in the Provincial Statute against preferring one creditor to another, the Stat. 13 Eliz., ch. 5, sec. 2, and it are substantially alike in their general provisions. *Wood v. Dixie*, (7 Q. B. 892) was a case of preferring one creditor to another, and does not decide that the intent to defeat creditors is not enquirable into even when the sale was for good consideration and intended to pass the property; but,

Semble, it would not be sustained here under Provincial Act, which prohibits preferences.

Per J. Wilson, J., that the jury should have been further directed, that if the vendors were at the time of sale insolvent, or knew themselves to be on the eve of insolvency, and made the sale with

intent to defeat or delay their creditors; or to give one or more a preference, the sale was void, unless it was made in the ordinary course of trade to an innocent purchaser; that a sale may be *bona fide* as opposed to colourable, and yet void by Con. Stats. U. C., ch. 26, sec. 18, if the intent was to contravene its provisions; and that the question for the jury is, was it made with that intent? *Gottwalls v. Mulholland*, 62.

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INSPECTION.

See PRIVATE MEMORANDUM-BOOK.

—o—

INSURANCE.

Alteration in insurance premises—*Balancing of risks*.

Where one of the conditions of a policy of insurance was, "*if the risk shall be increased by any means whatever, or if the buildings shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void*," and after the effecting of the insurance certain alterations were made in the premises insured, consisting of the removal from one room to another adjoining it of a couple of dye-kettles, a different disposition of the flues and pipes connected therewith, and the erection of a new chimney, thereby to a slight extent increasing, (if considered as an isolated act,) but to a great extent diminishing, the risk, and the jury found that, though the erection of the chimney did *per se* increase the risk, yet that diminishing it in one place and increasing it in another the risk on the whole was not increased, and rendered a verdict in favour of the plaintiff.

Held, (distinguishing *Heneker v. British American Insurance Company*, 13 U. C. C. P. 99,) that there was no good reason why the jury should not have found as they did, and a rule to enter a verdict for the defendants was refused. *Date v. Gore District Mutual Insurance Company*, 175.

See POLICY OF INSURANCE.

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INTEREST.

1. *Interest agreed upon, however exorbitant, recoverable.*

Held, following *Howland v. Jennings*, 11 C. P. 272, and *Montgomery v. Boucher*, 14 C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate may be. In this case, therefore, the jury having perversely allowed only ten per cent. per annum, although they at the same time found that the defendant had signed the note or instrument agreeing to pay five per cent. a month a new trial was granted without costs.

Held, also, that the amount agreed upon was recoverable under the common count for interest and account stated. *Young et. al. v. Fluke*, 360.

2. *Computation of interest when payments made generally.*

Held, that the proper mode of computing interest, in the absence of payment made specially on account of principal, is to compute it on the amount due to the time of each payment, making rests, deducting the payments, and charging interest on the balance. *Bettes v. Farewell*, 450.

3. *Covenant for rent—Interest—Reference to master—Defen-*

dant resident abroad—Con. Stats. U. C. c. 22. sec. 161.

Held, that under *Con. Stats. U. C. ch. 22, sec. 191*, the master is empowered to ascertain the amount for which final judgment is to be entered not only in cases in which he could, but in cases which he could not before that act have computed what was due: and that the fact of the defendant being resident out of the jurisdiction, is on objection to a reference being directed for such purpose.

Held, also, that in an action of covenant for rent, an order by a judge in chambers, directing the master to allow the plaintiff interest on the amount claimed on the writ of summons, not specially indorsed, from the date of said writ, was properly made although no interest was claimed in the declaration. *Crooks v. Dickson*, 523.

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INTERPLEADER.

Affidavit to set aside verdict and for new trial, in interpleader cases, need not disclose merits.]—
See AFFIDAVITS.

See DIVISION COURTS, 1—NEW TRIAL, 4.

—O—

INTERROGATORIES.

Unsatisfactory answer—Refusal to discharge defendant.

When a defendant, in close custody under *ca sa.*, in an action of *crim. con.* has not satisfactorily answered interrogatories, and appears to have the means of satisfying a large portion of the judgment, he is neither entitled to be discharged under *Con. Stats. U. C. cap. 26, sec. 8*, nor to be re-committed under *sec. 11* for a period

of twelve months, and then discharged. *Glennie v. Ross*, 536.

See PLEADING, 8.

—O—

INTESTATE.

Sale of lands of intestate under fi. fa. against administrators of administratrix.]—See ADMINISTRATION.

—O—

INTRUSION.

Information of.]—See LAKES AND NAVIGABLE RIVERS.

—O—

IRREGULARITY.

Nisi Prius record—*Amendment by judge at trial*—*Omission*—*Issue book*—*Irregularities*—*Amendment*—*Waiver*—*Attorney*—*Costs*.

A party, if he desires to object to irregular or defective proceeding, must do so by making an immediate application to have them amended at the expense of him whose proceedings they are; for if he allow a fresh step to be taken in the cause without doing so, he will be held to have waived, and cannot afterwards object to, the irregularities complained of.

Held, therefore, that it was no ground for setting aside a verdict that the issue book served upon the defendant was in several respects irregular and defective, and differed from the *nisi prius* record in many material variance and mistakes, for these should have been amended, on the application of the defendant, at the expense of the plaintiff, before he allowed the latter to enter the record; and not having objected to them in this way, he could not be heard to do so afterwards. But the plaintiff's attorney having conducted

his proceedings with little care, the defendant's rule, set them aside, was discharged without costs.

In ejectment, a judge at *nisi prius* has power to amend the record by adding a *venire*, and inserting the dates in the notes annexed thereto.

In such an action it is no objection to the record, on the part of a defendant, that it omits the entry of judgment as to the undefended part of the land, provided it contain the issue raised by him. *Harrington v. Fall*, 541.

—O—

ISSUE BOOK.

No ground for setting aside a verdict that the issue book served on defendant was in several respects irregular and defective, and differed from the nisi prius record.]—See IRREGULARITY.

—O—

JUDICAL DECISIONS.

Series of, in this country, to be followed in preference to single decisions in England.]—See OBLIGOR (OF BOND TO CONVEY ON A DAY CERTAIN.)

—O—

JURISDICTION.

Of Division Court.]—See DIVISION COURTS, 1.

—O—

JURY.

Directed to disregard confession.]—See CRIMINAL LAW, 3—PRINCIPAL AND AGENT.

—O—

JEWISH MARRIAGE.

Proof of.]—See COMMISSION TO TAKE EVIDENCE, 1.

JOINT TORT.

Proof of.]—See MAGISTRATE.

—O—

JUDGE.

Duty of in case of confessions,]—See CRIMINAL LAW, 3.

Charge.] — See JUSTICE OF PEACE.

Of Division Court, must decide interpleader application to try the question of property in goods without the aid of a jury.]—See DIVISION COURTS, 1.

—O—

JUDGMENT.

Proof of by production of roll.]—See EVIDENCE, 1.

Entry of must be averred to render valid a plea of recovery of verdict in a former action for same causes of action.]—See PLEADINGS, 7.

—O—

JUDGMENT BY DEFAULT.

In a case where the statute of Limitations would have been a bar, judgment by default is no proof of fraud in defendant.]—See EVIDENCE, 1.

—O—

JUSTICE OF THE PEACE.

Property qualification—Cons. Stats. C. ch. 100, sec. 3.—Conflicting evidence—Judge's charge.

In a *qui tam* action against defendant for acting as a justice of the peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises, on which defendant qualified, was vague, speculative and inconclusive, one of the witnesses, in fact, having afterwards recalled his testimony as to the value of a portion of the premises and placed a

higher estimate upon it; while the evidence tendered by the defendant was positive, and based upon tangible data.

Held, A. Wilson, J., *dissentiente*, that the jury were rightly directed, "that they ought to be fully satisfied as to the value of the defendant's property before finding for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant."

Observations on the principle of the valuation of land with a view of determining the property qualification of justices of the peace. *Squire qui tam v. Wilson* 284.

See EVIDENCE, 2—PLEADING, 10.

—O—

JUSTIFICATION.

See PLEADING, 2, 15.

—O—

MARKET.

Obstruction to by tenant of corporation after lease of market fees.]—See LANDLORD & TENANT, 2.

—O—

LAKES AND NAVIGABLE RIVERS.

Obstructing the waters of the lakes—Information of intrusion.

The property in the soil adjacent to the shore, and which is covered by the waters of the lakes or of navigable rivers, is in the Crown, subject to the right of the public to pass over the water in boats and to fish and bathe therein.

Held, therefore, where the defendant had encroached on a portion of lake Ontario, not far from land belonging to himself, but not adjoining it, by the construction therein of certain cribwork and

piers, upon which he had built a warehouse, that these, not being natural accretions to his land, but artificial impediments to the waters of the lake or harbour, (the harbour being then vested in the Crown,) must be considered to be upon the soil of the Crown, and that the defendant was liable to be removed therefrom on an information of intrusion at the suit of the Crown. *The Attorney General v. Perry*, 329.

LANDLORD AND TENANT.

1. *Lease — Renewal — Compensation for improvements — Mode of valuation — Construction of the naked expression "month."*

M. leased certain premises to E. for twenty-one years, covenanting that if E., his *executors, administrators or assigns*, should desire to renew said term, (three months notice having been first given,) the rent for the extended period should be fixed by arbitration; that if M. neglected to seal and deliver a new seal upon the terms agreed on, M., his *heirs and assigns*, would pay, or cause to be paid at a fair valuation to E. for all buildings or improvements put upon the premises, excepting those erected at the date of the lease; that if M. neglected or refused to pay within one month for such improvements, the lease should be deemed and considered to be renewed for twenty-one years longer at the same rent as before. M. devised the premises in question to the plaintiff, or some of them. E. sub-let to H. B. W., reserving a reversion, and subsequently assigned to defendant, having previously, and about three months before its expiration, made a claim in writing for a renewal of the term. Defendant notified the

plaintiffs before the expiry of the term of his purchase of the lease and his readiness to submit to arbitration as to the improvements made during the term. N., one of the plaintiffs, replied on their behalf that the devisees would not renew, and requested defendant to point out the improvements made by E. and defendant, with a view to arbitration if necessary. No improvements of any kind had been made by E. prior to the sub-lease, nor by defendant since the assignment, but all had been done by H. B. W. during his sub-tenancy, he having erected several buildings in addition to those already on the premises. No demand of possession was made other than that contained in the reply to defendant's notice.

Held, on ejectment brought by the plaintiffs, that the refusal by the latter to renew the lease was a refusal to settle a new rent and to execute a new lease, and a discharge to defendant from all necessary precedent acts for that purpose; that this discharge entitled him to compensation for improvements, and to the constructive renewal of the lease on failure of plaintiffs to pay for them; that the improvements to be paid for were not those that might be made by E. *alone*, but by any person claiming under him having the right to make them, and that H. B. W. having had that right, and the improvements made by him not having been paid for by plaintiffs, the lease must be deemed to be renewed, which could only be done by its operating in favor of defendant, the assignee of E.

Held, also, that, the lease notwithstanding for the mode of valuation, the plaintiffs might have made it and tendered the amount to defendant, subject to determi-

nation by a jury as to its fairness and reasonableness, in case of defendant's refusal to accept it; but that the defendant's omission to have the valuation made gave the plaintiffs no right to eject.

Held, also, that though under the circumstances of the case it might be said that plaintiffs were entitled to the month next after the expiry of the old lease within which to pay for the improvements, and though they had brought their action *within the month* which must mean a *lunar-month*, and would, therefore have been entitled to a judgment in their favour, if they had had the right of entry during this month however subjected to be restrained from enforcing their judgment on the determination of that right of entry before the execution of a writ of possession: yet that during this month, or until, at any rate, paid for the improvements, or pending negotiation respecting improvements, defendant could not be treated as a trespasser; but that he had such an inchoate right in the land, which might be converted into an absolute estate for a further term of twenty one years, as entitled him to continue in possession, particularly in the absence of any unequivocal demand to deliver up possession, or, at any rate, to enter on 30th June 1864, the very next day after the commencement of the action; and even if plaintiff could have maintained ejectment during the twenty-eight years against the defendant, the subsequent accrual of the latter's legal estate, by the plaintiff's failure to pay, would have related back to the expiration of the lease, as the date of the commencement of the renewed term.

Distinction between a lease of

this kind and the ordinary lease where a renewal is claimable and is claimed, observed upon. *Nuddell et al. v. Williams*, 348.

2. *Lessee of market fees—Obstruction of Market by tenant of corporation.*

Where the defendants leased to plaintiff the market fees of a wood market established in one of the public highways of the city, covenanting against their own interference, or that of any one by their license, with the collection of said fees, having upwards of twenty years previously passed a by-law, recognizing, with certain restrictions, the writ to deposit materials for building purposes on the highways of the city, and subsequently demised certain premises adjoining the market to one M., who obstructed a portion of the same with building materials,—in an action by the plaintiff against the defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market.

Held, that such an action was not maintainable; that the by-law was one which the defendants had authority, with a view to public improvement and convenience, to pass and that the plaintiff must be taken to have been cognizant of it when he became their tenant; that M. might, without the license of the defendants, have occupied a reasonable portion of the highway the by-law apparently merely restricting, without expressly conferring, the right of occupation; that the market being fixed on a public highway, which is *prima facie* for purposes of public travel the exercise of the rights incident of such market must be subordinate to the pri-

mary and principal purposes of the highway; that there was no such implied covenant for quiet enjoyment as the plaintiff asserted for there could not be in the highway any such absolute and exclusive enjoyment as he claimed was secured to him. *Reynolds v. The Corporation of the City of Toronto*, 276.

See PLEADING, 3.

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LEASE.

See EVIDENCE, 1—EXCESSIVE DEMISE—LANDLORD & TENANT 1.

Proviso for determination by notice—Forfeiture for non-payment of rent.]—See PLEADING, 3.

—O—

LESSEE.

Of market fees.]—See LANDLORD AND TENANT, 2.

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LIMITATIONS, (STATUTE OF).

Limitation of actions—Con. Stats. U. C. ch. 88, secs. 1, 3.

The bringing of the action, not the recovery of possession, stays the operation of the Statute of Limitations; therefore, where possession was taken under a *hab. fac. poss.*, though after a delay of ten years from the recovery of judgment,

Held, that the possession so taken related to the date of bringing the action, and that the intervening ten years' possession would not enure to the benefit of the tenants as to assist him in claiming title under the statute.

Held, also, that a person going into possession under a deed from one who is supposed to be the heir of the grantee of the Crown, but who is found by the jury not to have been the heir of the grantee,

is not a person *claiming to hold under the grantee* within the meaning of sec. 3, so as to be relieved from showing that the grantee, or some one claiming under him, had notice of his possession. *Turley v. Williamson*, (tenant), *John Johnston*, (Landlord), 538.

See ADMINISTRATION.

—O—

LIVERY OF SEISIN.

Evidence of.]—See DEED.

—O—

LOST DEED.

Sufficient of search for to admit secondary evidence]—See MEMORIAL.

—O—

MAGISTRATE.

Magistrate—Trespase—Information—Warrant, evidence of—Joint tort—evidence—Notice of action—General verdict—Restricting to one count—Verdict against two defendants on separate counts.

The warrant of a magistrate is only *prima facie*, not conclusive evidence of its contents; as, for instance, of an information on oath, and in writing having been laid before him.

Such information must be, under Con. Stats. C. cap. 102, sec. 8, not only on oath, but in writing: and except on an information *thus* laid, there is no authority to issue the warrant.

In this case, the magistrate having acted in direct contravention of the statute, in issuing a warrant without the proper information under the statute, or without even a verbal charge having been laid against the plaintiff, and there being no evidence of

bona fides on his part, the court held that he was not entitled to notice of action.

Semble, 1. That the fact of a magistrate's issuing a warrant without the limits of the county or which he acts does not necessarily disentitle him to notice of action. 2. That such notice will be bad, if it omit the time and place of the alleged trespass.

A general verdict, on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court being of opinion that there was only one joint cause of action against the defendant, that is the arrest, restricted the verdict to that count.

Held, also, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued and the other issued it; that both knew that no charge had been made against plaintiff; that the warrant was given by the one to the other for the arrest of plaintiff, who was accordingly arrested upon it, and that illegally.

Held, also, that the effect of this evidence was not destroyed by the fact that the arrest was made in another county and under the authority of another magistrate's endorsement upon the warrant; for that that endorsement was not strictly the authority to arrest, but merely to execute the original warrant; and that the arrest was wrongful not from the endorsement, but from the antecedent illegal proceedings of the defendants; and that the defendant who issued the warrant was of much responsible as if the arrest had been made in his own county.

Semble, 1. That if it had appeared that defendant who issued

the warrant was liable in case only, and malice of some special kinds, personal to himself, in which his co-defendant was not, and could not be a partaker, had been proved a joint action would lie against both. 2. That one defendant might have been convicted in trespass and the other in case. *Friel v. Ferguson*, 584.

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MARRIED WOMAN.

Deed to.] — See DEED.

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MEMORANDUM BOOK.

See PRIVATE MEMORANDUM-BOOK.

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MEMORIAL.

Search for lot deed, what sufficient to admit of secondary evidence — Memorial executed by grantor, good evidence against third parties.

In this case of lost deed it is always a question for the presiding judge whether sufficient search has been made to justify and admission of secondary evidence as to their contents.

In this case the witness, who was the son of the late agent of one of the grantors, stated that his father had possession of all the papers of the grantor relating to lands in Upper Canada; that he had searched through his father's papers and the papers of the grantor, all of which were then in possession of himself and mother; that, at the suggestion of the executors of the said grantor another person had searched among those of his papers deposited in a certain bank, as well as elsewhere amongst his private papers but that he had not applied to the heirs or devisees of the grantor,

though he had made every other inquiry where there was probability of his finding the deeds in question; nor had he searched among the papers of the other grantor, because he was a bankrupt, and the grantor amongst whose papers he had already searched was his assignee.

Held, sufficient to justify the admission of secondary evidence as to the deeds in question.

Held, also, that a memorial twenty-five years old, which a witness stated he believed to be signed by the deceased grantor in the deed, basing his belief on the fact that the signature closely resembled his handwriting which he had seen in the books and papers belonging to him in his (the witness') charged though he had never seen him write, and the signatures of the witnesses to which memorial, one of whom was dead, and the other out of the jurisdiction, he knew; or a memorial, upwards of thirty years old, produced by the deputy-registrar from the registry office, and signed by the grantor in the deed, reciting the deed and its contents; is good evidence of the execution of the deed: in the latter case either as affording secondary evidence of its contents, which would be good against all the world, or as a declaration or admission under seal by the owner of the fee, when in possession, that he had sold and conveyed to the grantee.

Semble, that in the former case proof of the handwriting of the grantor alone would have been sufficient evidence.

Held, also, that a memorial signed by the grantor is evidence not merely against the grantor and all claiming under or in privity with him, but against third parties also, as being a statement and

act by the party in possession against his own interest as the reputed owner of the land in question.

Quære, whether this would be so if it appeared that the land was at the time in the actual possession of some one other than the grantor and not holding in privity with him. *Russel v. Fraser*, 375.

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MERITS.

General affidavit of.] — See AFFIDAVITS.

—o—

MISTAKE.

In style of cause of commission fatal.] — See COMMISSION TO TAKE EVIDENCE, 2.

—o—

MORTGAGE.

See TRADE FIXTURES.

—o—

MUNICIPAL CORPORATIONS.

May take any rate of interest. — See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

—o—

NAVIGABLE RIVERS.

The property in the soil adjacent to the shore, and which is covered by the waters of navigable rivers, is in the crown.] — See LAKES & NAVIGABLE RIVERS.

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NEW ASSIGNMENT.

See PLEADING 5, 2.

—o—

NEW TRIAL.

1. Expecting cause to be referred.

Where a party expecting that a cause would be referred was unprepared with proper evidence at

the trial, and a verdict was in consequence rendered against him, the court, without expressly recognizing this as a ground, under the circumstances granted a new trial as they considered that the case had not gone fairly to the jury, and that the latter had been influenced by the assertions of counsel not sustained in evidence. *Gott v. Ferris*, 295.

2. *Ejectment for the whole—New trial as to half.*

The court has power to grant a new trial as to half of a lot of land, allowing a verdict to stand as to the other half, when the granting of such new trial is in the discretion of the court; and this in an action of ejectment. When the new trial is order *ex debito justitiæ* the whole record is thrown open; and this will be done in ejectment, unless the defendant consents to a verdict standing for such portion of the land as the plaintiff has failed to prove title to. The statute governing the action of ejectment makes it divisible both as to the lands and the parties claiming them. *McNab v. Stewart*, 189.

3. On motion for a new trial.

Held, that although defendant may not have contracted to deliver the best quality of oats, yet that, inasmuch as the grain delivered was a mixture of oats and wheat, he had not fulfilled his contract to deliver oats; and, the jury having found for the defendant, a new trial was granted, but only on payment of costs as the amount of damages to which plaintiff appeared entitled was only about \$100. *Twohy v. Armstrong*, 273.

4. *Interpleader—Priority of writs—Evidence.*

Although the fact of a party not pressing a *pluries fi. fa.* in the sheriff's hands, coupled with the undoubted fact that he had placed the original writs there *not to be executed*, is evidence on which a jury may find that the later writ has also been delivered to the sheriff not to be acted on, and has therefore lost its priority as against a subsequent writ at the suit of another party; yet, the jury having found in favour of the execution, the court will not interfere with their verdict by granting a new trial, as it cannot be said that there was no evidence to support it. *Kerr et al. v. Kinsey*, 531.

See CRIMINAL LAW, 2—COMMISSION TO TAKE EVIDENCE, 2—FEIGNED ISSUES—PARTNERS—CHATTEL MORTGAGES—CLEARING OF LAND—PRIVATE MEM. BOOK—OBLIGOR (OF BOND TO CONVEY ON A DAY CERTAIN)—IRREGULARITY.

—O—

NISI PRIUS RECORD.

Amendment of, in ejectment by judge at Nisi prius—no objection to the record, on part of a defendant, that it omits the entry of judgment as to undefended part of the land provided it contain the issue raised by him.]—See IRREGULARITY.

—O—

NONSUIT.

See PLEADING, 15—EVIDENCE, 2.

—O—

NOTICE.

To debtor to answer interrogatories in ten days.]—See PLEADING, 8.

—O—

NOTICE OF ACTION.

To Magistrate.]—See MAGISTRATE.

To Division Court Bailiff.]—See DIVISION COURTS, 2.

OBLIGEE (OF BOND FOR A DEED.)

When not bound to tender deed for execution.]—See OBLIGOR (OF BOND TO CONVEY ON A DAY CERTAIN.)

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OBLIGOR (OF BOND TO CONVEY ON A DAY CERTAIN.)

By whom deed to be tendered—Damages on default—New trial.

Where the obligor of a bond binds himself to convey lands on or before a certain day, the bond providing for no act to be done by the obligee as a condition precedent to his receiving the deed, he can only discharge himself from liability by preparing and executing a deed to the obligee, and the latter need not tender the deed for execution. The obligor making such a bond with the knowledge that he has no title to the land is liable for damages to such reasonable amount within the penalty, as the obligee of the bond can shew he is intitled to. In this case, however, as the damages awarded to the plaintiff appeared to be excessive, and the defendant was willing and then in a position to make a deed to the plaintiff, who had so far not suffered from the want of it, and the delay had not been wholly the fault of the defendant himself, a new trial was granted to the defendant on payment of costs. *Sikes v. Wyld*, 1 Best & Smith, 587, commented upon.

If there be a series of decisions in the courts of this country leading one way, they should be followed in preference to a single decision of an English court, especially where in it there was a difference of opinion among the judges. *Scott v. Reikie*, 200.

ORIGINAL (JOINT & SEVERAL)

Crown may have sci. fa. against one or all.]—See SCIRE FACIAS.

—o—

OBSTRUCTION.

Of market by tenant of corporation after lease of market fees.]—See LANDLORD AND TENANT, 2.

Of the waters of the lakes.]—See LAKES AND NAVIGABLE RIVERS.

—o—

ORDER FOR PAYMENT OF MONEY NOT ADDRESSED.

See CRIMINAL LAW, 1.

—o—

PARTNERS.

Execution of deed by one for both—Allusion on subsequent trial to former verdict—Alteration in entry of verdict on record.

Held, that where one of two partners signed in name of both in the presence of the other, and for him with his assent, though there was but one seal, it was the deed of both.

It is no ground for setting aside a verdict that the counsel merely referred to a verdict on a former trial, expressing a hope that the jury would give the same verdict as had been given before, but desisting when the allusion was objected to, unless the judge who tried the cause is satisfied that the matter was pressed unfairly and with the view of exercising an improper influence on the jury.

Where a verdict has been erroneously entered on one count, the record may at any time afterwards, by leave of the judge who tried the cause, be altered, and the entry thereof made on another count.

Held, also, that where by mistake a verdict for a certain amount

is entered on the record, and the foreman of the jury, before the jury separate or leave the box, points out the error, the judge is right in erasing the entry and making in lieu thereof another to which the jury have assented as being their verdict." *Moore v. Boyd et al.*, 513.

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PARTNERSHIP.

Joint adventure — Partnership — Contract of hiring and service — Competency of witness.

Where the defendant P. entered into a written agreement, as "D. P. & Co.," with the other two defendants N. & J., as "H. J. N. & Co.," reciting that the parties had agreed to carry on certain lumber transactions *on joint account*, and providing for a *joint capital* to carry on such *joint* transactions—that advances on the joint account should bear interest,—that the returns from a certain cove should be *on the joint account*, and the rental thereof paid out of the profits of *the joint account*,—that any of the parties that might be agreed upon might contract for timber for *their joint interest*, and all expenses should be charged to *the joint account*,—that the profits or losses of *the joint business* should be divided in a certain way, and the commission, charge and *profits* arising from *the joint account* shared equally, and in case of difference as to their *joint transactions*, arbitration should be resorted to; and where, subsequently, the said P. entered into separate written contracts with G. S. & M. to furnish D. P. & Co. a certain quantity of timber, there being no mention in said agreements of any joint stock, nor of any contribution by G. S. & M. for losses sustained, nor of any share proper of

the profits to be enjoyed by them (except as to a certain class of timber, the total profits of which they were to share *equally* with D. P. & Co.) but in return for their *services* they were to receive half the profits of the timber up to a certain price per foot, which it was stipulated should belong to D. P. & Co., and be delivered to them at a certain point in Lower Canada,—that D. P. & Co. should make advances to aid in the manufacture and conveyance of the timber to its destination, and that the parties should pay them interest on such advances; and where the plaintiffs carried to T., over their railway, the timber forwarded by the said parties in pursuance of their agreements, charging the freight in their books to *said parties*, and *not* to D. P. & Co., *but parting with the timber at the request of D. P. & Co. before payment of the freight, contrary to their previous course of dealing with G. S. & M.*

Held, 1. That the firstly above referred to agreement, entered into by the defendants with one another, created a partnership between them, and that when P. contracted with G. S. & M., he did so as agent of the defendants, under the partnership name of D. P. & Co."

2. That the agreement secondly above referred to, entered into between D. P. & Co. and G. S. & M., constituted a mere contract of hiring and service, and not a partnership, not even as to the timber, in the total profits of which they were to share equally; for that there were none of the incidents of a partnership contained in the agreements, inasmuch as there was an absence of all community of interest in the general and final

result of the adventure, on interest in or share of the capital, a mere contribution of personal service towards the enterprise, for which they were to be remunerated by a certain proportion of profits, and no liability for possible losses beyond a certain sum agreed to be paid then for their *services*.

3. That in the conflict of testimony as to which of the parties credit was given to by the plaintiffs in their dealings, the weight of evidence and the collateral circumstances being in favour of a dealings with the defendants, and the case not having gone as fully and correctly to the jury as it should have done, a new trial ought to be granted to the plaintiffs on payment of costs.

A witness called on behalf of the defendants to a suit, who is not a party to the record, although a partner of those calling him, is a competent witness for the defendant. *The Northern Railway Company of Canada v. Duncan Patton, Henry J. Noad, and Wm. H. Jeffrey*, 332.

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PART PERFORMANCE.

Sale in bulk—Delivery of part passes property in the whole—Statute of Frauds.

Plaintiff sold to defendant a certain quantity of wood, cut and lying on his premises, supposed to be about one hundred cords, agreeing to remove it from his (the plaintiff's) land to the bank of a canal adjacent thereto, and there deliver it from time to time for defendant. Forty-one cords were thereupon so delivered, and taken away by defendant and subsequently twenty-five cords more were delivered at the same place. After the delivery of the latter the price of wood arose, whereupon

plaintiff forbid defendant removing the twenty-five cords, which however, defendant did. The plaintiff having brought replevin and failed in his action.

Held, affirming the judgment of the County Court discharging rule for a new trial, that the jury having found the above facts it was not necessary for defendant to measure the wood so delivered in order to acquire property therein; that the mere delivery of the twenty-five cords by plaintiff, in part performance of his contract, passed the property therein to defendant, which would not be divested by any subsequent act of plaintiff.

Semble, that any lien for the price which the plaintiff might before have had upon the wood was lost by its removal to land neither his own, nor under his control. *McNeil v. Keleher*, 470.

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PAST CONSIDERATION.

See EQUITABLE PLEADINGS, 2.

—o—

PAYEE.

Action by against indorser.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

—o—

PAYMENT.

Evidence of.]—See BILLS OF EXCHANGE & PROMISSORY NOTES, 2.

—o—

PLEADING.

1. *Action for cutting away, removing and destroying a bridge—Pleading—Demurrer to Plea.*

Declaration, that defendant wrongtully and injuriously cut away, removed and destroyed a bridge, belonging to the plaintiffs,

across the river Moira, in the township of Thurlow, on the line of road and public highway leading through the township of Thurlow to the townships of Tyendinaga and Hungerford.

Plea, that the river Moira, where &c., and when, &c., was a navigable river and public highway for the conveyance of timber, &c., down same to Bay of Quinte, and has been and still is used for such purposes; that in navigating such timber, &c., it was necessary to navigate same in the river, where it is crossed by the bridge; that defendant with others was engaged in conveying timber, &c., down the river to the Bay of Quinte; that the free navigation of the river for the passage of timber, &c., at the time when, &c., was obstructed and hindered by the bridge, in consequence whereof the timber, &c., of defendant with those of other persons, in the course of such navigation came against the bridge thereby causing the alleged injury and damage to the same, which were unavoidable and could not have been prevented by due and reasonable care and diligence of the defendant.

Held, on demurrer, plea bad, for not disclosing such a state of facts as to constitute the bridge a nuisance, or to shew that the acts complained of were really inevitable on the part of the defendant in consequence of the improper construction of the bridge, or by reason of a superior agency operating against the defendant; and for not alleging that the defendant was acting with due and reasonable care and diligence in the navigation of his timber.

Semble, that had the plea stated that the damage was occasioned by reason of the bridge having been so improperly built as in

effect to be a nuisance to the free navigation of the river, and that the damage was not caused by the negligence or improper conduct of the defendant, and could not have been avoided, it would have constituted a good defence. *The Municipality of the Corporation of the Township of Thurlow v. Bogart*, 9.

2. Trespass—Plea of justification—Demurrer.

Trespass *quare clausum fregit*, upon the dwelling-house of the plaintiff without reasonable or probable cause, and under a false and unfounded charge and assertion that plaintiff had stolen property in his house, searching and ransacking same, and making disturbance, &c., by which plaintiff was both interrupted in the quiet enjoyment of his dwelling-house, and suffered injury to his credit and character, by reason of a belief being excited in the community in consequence of such searching that he had stolen goods, and had them in his possession.

2nd count.—That defendant broke and entered, &c., and stayed and made a noise and disturbance therein for a long time, and broke open the doors of said dwelling-house, and expelled plaintiff and his family from possession of said dwelling-house, and kept them expelled for a long time, whereby plaintiff during all that time lost and was deprived of the use of same.

Plea—That before the alleged trespasses in the declaration mentioned, as to the alleged breaking and entering of the dwelling-house of plaintiff, certain goods of the W. were feloniously stolen by some person unknown, and were believed to be in said dwelling-house of plaintiff, with plaintiff's

knowledge that they were so stolen; and defendants having such belief and the plaintiff having been seen in possession of same, at request of said W. and in his aid, immediately after the theft of same, in day-time, broke and entered said house, the outer door being open, for the purpose of searching for said goods, and there in said house did search and find said goods, which were then given up by plaintiff to defendant as goods of said W., and which are the trespasses, &c.

Held, on demurrer, plea good, it clearly appearing from it that the goods were stolen; that they were in plaintiff's house (being found there); that they were taken by the defendant at the owner's request and in his aid, immediately after the theft, the outer door of the house being open. *Rayson v. Graham*, 36.

3. Landlord and Tenant—Proviso for determination of lease by notice — forfeiture for non-payment of rent—Emblements—Right to bring ejectment without demand—Plea—Demurrer.

In an action by a tenant against his landlord for refusing to permit him to enter on the demised premises to take away the emblements, it appeared that the defendant gave notice, after the crops were sown, to terminate the lease according to a proviso contained in the instrument, and the lease was so terminated on the 20th March. After that day, and before the 30th March, defendant brought ejectment to recover possession of the demised premises. The defendant, by his plea, set up, that there was also a provision in the lease, that if any part of the rent of the premises should remain unpaid for fifteen days after it

ought to be paid, *although no formal demand should be made thereof*, the landlord might re-enter and enjoy the premises as of his former estate; that a part of the rent was due and unpaid on the 15th March, and before he could recover in his action of ejectment or get possession more than fifteen days had elapsed from that time, and he had a right to enter for such default, and he entered after the expiration of the fifteen days on account of the said right of re-entry for non-payment of rent, as well as on account of the termination of the lease by notice; and by reason of plaintiff's default in payment of rent and defendant's entry, plaintiff forfeited his right to the emblements, and they became defendant's, as part of his revisionary estate in the land.

Held, on demurrer, plea bad; 1st, because there could be no forfeiture of the term under the provision for the non-payment of rent, after the term was at an end, which was the case before the forfeiture became complete; 2nd, because the defendant, having by his notice terminated the lease and sued in ejectment to recover possession before there could have been any forfeiture for non-payment of rent could not afterwards be permitted to set up such non-payment as a forfeiture, as by the course he pursued he had deprived the plaintiff in the present action of the opportunity of obtaining relief in the former action from the effect of such forfeiture.

Held, also, that the defendant, under the proviso contained in the lease, as set forth in the plea, could have brought ejectment against the plaintiff in the present action for non-payment of rent, without making the formal demand

which would otherwise have been requisite at common law, though there might have been sufficient distress on the premises to satisfy the arrears of rent. *Campbell v. Baxter*, 42.

Sale by individual members of a company of their personal interest therein—Legality of—Pleading.

The declaration represented the plaintiffs and one C. to have individually associated themselves together for the purpose of procuring an act of incorporation as a Gas Company, which they succeeded in obtaining; that for this and other services rendered they had acquired a claim against the company to a certain amount; that they were individually possessed of certain books, &c., belonging to themselves, relating to the company, and that at the request of the defendant and one H. they agreed to surrender and did surrender to defendant and H. 1. All their said claim against the company; 2. The subscription list; 3. The books, &c., of the plaintiffs; 4. As far as they lawfully could their right, title, interest in, or control over, the assets of the company, and the charter of incorporation; for all of which the defendant and H. jointly and severally bound themselves to pay the plaintiff \$3,000.

Held, on demurrer, that the declaration was good; for the sale alleged was not of the franchises and charter of the company, but of the mere claims of the plaintiffs thereon and their personal rights and interests in the concern. *Milner et al. v. Thompson*, 186.

5. *Unstamped promissory note*—27 & 28 Vic. ch. 4—*Pleading*
Where the defendant neither

denied the making of the note sued on, nor pleaded the absence of a stamp, *Held*, that a defence on the latter ground could not be urged.

Semble, 1. That the only mode of raising the defence of the want of a legal stamp is by a plea denying the fact. 2. That such plea would be displayed by evidence shewing that the instrument had been properly stamped at the time of signature, and initialed by the maker but had been rubbed off, defaced, or improperly removed by some one else; that on these facts being shewn the note would not be void, and that the defendant would be relieved from penalty under the act. *Baxter v. Baynes*, 237.

6. *Promissory notes payable in American currency—Plea, tender before action brought of smaller amount in Canadian currency, alleged to have been at time of tender equal to plaintiff's claim—Demurrer*

To the first and second counts of a declaration on two promissory notes dated respectively 11th September and 29th November, 1860, for the respective sums of \$500 24 and \$388 85, payable six months after date, the defendant pleaded that the notes were signed and entered into in the State of Illinois, one of the United States of America, to be paid when due in United States currency, and alleged a tender by defendant before action of \$606 12 of lawful money of Canada, which was at the time last aforesaid equal to plaintiff's claim, and a refusal by plaintiffs to accept same.

Held, on demurrer, plea bad; firstly, for alleging the amount tendered to have been equal to the plaintiffs' claim on the day of tender, before action brought, instead

of at the time of the maturity of the notes sued upon, with subsequent interest, &c. ; and secondly, for alleging that the amount tendered was equal to *plaintiff's claim* instead of "equal in value to a certain sum of the currency of the United States," &c. ; though,

Seemle, this might be only ground of special demurrer, *White et al. v. Baker*, 295.

7. *Action for non-delivery of article contracted for—Plea, recovery of verdict by defendant in former suit for same cause of action—Demurrer.*

The first count alleged that the defendant bargained and sold to the plaintiff, and the plaintiff bought of the defendant, a certain quantity of oats at a certain price per bushel, to be delivered by the defendant to the plaintiff within a reasonable time at the city of Toronto and all conditions, &c., were fulfilled so as to entitle plaintiff to the delivery of the said oats, yet defendant did not deliver to plaintiff the said oats, whereby, &c.

The second count alleged an agreement between plaintiff and defendant that plaintiff should buy of defendant a certain quantity of *Canada* oats, and that defendant should deliver same to plaintiff at a certain place, yet defendant delivered to plaintiff as and for the said *Canada* oats, the same quantity of a heterogeneous mixture of burnt wheat and oats greatly inferior in value of *Canada* oats and defendant never delivered to plaintiff the *Canada* oats, and that the mixture so delivered was wholly valueless to and unsaleable by plaintiff, &c., &c.

The defendant pleaded, that the oats mentioned in the first and second counts were one and the same lot of oats, and that there-

fore, on the 18th August, 1864, in an action brought against the plaintiff, or the recovery of the price of these same oats, in which the now plaintiff pleaded that the debt thereby claimed from him was contracted by and through the fraud of the now defendant, upon issue joined in said action, which involved the identical facts alleged as breaches of contract in the plaintiff's declaration in this action a verdict was rendered for the now defendant.

Held, on demurrer, plea bad, as not alleging that judgment had been entered on the verdict.

Held, also that the second count of the declaration was good.—*Twohy v. Armstrong*, 269.

8. *Bond to the Sheriff—Notice to debtor to answer interrogatories within ten days—Assignment of bond—Pleading.*

The declaration, after reciting that the plaintiff had recovered a judgment against one G. for a certain sum; that a writ of *ca. sa.* had been issued under said judgment, on which the said G. had been taken in execution and committed by the sheriff to close custody; that thereupon said G. and the other defendants gave bail to the said sheriff, entering into a bond conditioned that said G. should observe and obey all notices, orders, and rules of court, touching and concerning him the said G., or his answering interrogatories, &c., &c.;—assigned as a breach of the conditions of the said bond, that, the said G. enjoying then the benefit of being released from confinement in close custody, the said plaintiff did duly file certain written interrogatories for the purpose, &c., and did cause a copy of the same to be served on said G., requiring him to file

his answer under oath thereto *within ten days after the service thereof* * * * and thereupon, it became the duty of said G. to file his said answer on oath *within the said time*; yet said G. did not file his said answer *within the said time*, although the time, &c., * * * by means whereof the said bond became forfeited, and thereupon the said sheriff did assign said bond to the plaintiff, pursuant to the statute, &c.

Held, on demurrer, that the declaration was bad; first because there was not sufficient breach of the condition of the bond shewn, the only breach shewn being the omission to comply with the notice requiring the defendant to answer the interrogatories *within ten days*, which was not authorized by the statute; and secondly, that inasmuch as no sufficient breach of the bond was shewn, the sheriff had no authority to assign the bond, so as to enable the assignee to sue in his own name.

Semble that the failure of the debtor to answer interrogatories, or to attend to be examined, upon notice theretore given by the plaintiff *of his own mere motion*, would not work for forfeiture of such bond; but that to work such forfeiture there must be a judge's order or rule of court requiring the debtor so to answer or attend. *Hicks v. Godfrey et al.*, 262.

9. *Action on promissory note—Accommodation maker—Extension of time to indorser—Pleading*

To a declaration against defendant as maker of a promissory note, the defendant pleaded, by way of equitable plea, that for the accommodation of one G. and without consideration he had made his promissory note, which was subsequently by G. indorsed

to plaintiff; that plaintiffs, being the holders of said note with the knowledge that defendant was a mere accommodation maker took from G. without defendant's knowledge a mortgage on real estate for the amount of said note with others then held by them, and by said mortgage gave time to said G. for payment of the amount secured thereby; that afterwards, in ignorance that time had been so given by plaintiffs to G., he (defendant) several times renewed said note at the request and for the accommodation of said G., and without consideration theretore, all of which was known to plaintiffs; but that as soon as he became aware of the time so given to G. he refused to renew said note; that the note sued on was in truth and in fact for the same sum, and was only a renewal of said note so held by plaintiffs when they took said mortgage from, and gave time to, G., and that by giving said time to G. the position of defendant as against G. was prejudiced and injured, the said G. having been for a long time and being then insolvent and his (defendants) recourse against him being thereby defeated and destroyed; that all said acts were done by plaintiffs with the full knowledge that defendant was such accommodation maker, and was in fact only surety for said G. and that he had received no consideration for making said note.

Held, on demurrer, on the authority of *Bailey v. Edwards*, 9 L. T. N. S. 646, plea good, as averring that when they gave time to G. plaintiffs were aware that defendant was only an accommodation maker. *Bank of Upper Canada v. Ockerman*, 363.

10. *Justice of the Peace—Con. Stats. U. C. ch. 124, secs. 1, 2—Pleading.*

In an action against a justice of the peace for a penalty for not returning a convict to the Quarter Sessions, it is no objection to the declaration that the plaintiff sues for the Receiver General, and not for her majesty the Queen, inasmuch as suing for a penalty for the Receiver General, for the public uses of the province, is in fact suing for the Queen. Besides, Con. Stats. U. C. ch. 124, authorize a party to sue *qui tam* for the Receiver General.

Held, also, that the defendant, having actually convicted and imposed a fine could not except to the declaration on the ground that it did not show that he had jurisdiction to convict.

It is not necessary, in averring a conviction, to shew that the complainant prayed the justice to proceed summarily. *Bagley quitam v. Curtis*, 366.

11. *Wrongful distress—Variance between declaration and evidence—Condonation—2 Wm. & M ch. 5. sec. 5—Pleading.*

In an action by a tenant against his landlord for a wrongful distress and sale of his goods, the gist of the action is the wrong complained of, and therefore a variance between the contract set out in the declaration and that proved is immaterial.

Quære, as to the writ of a landlord to distrain and sell his tenants goods for a non-fulfillment of a contract respecting certain rails agreed to be delivered in lieu of rent for the demised premises.

Held, also, that the receipt by the tenant from the bailiff of the surplus of the proceeds of the sale was no condonation of the tortious act complained of, the payment having been neither made nor ac-

cepted in satisfaction or compromise of the injury suffered.

In such an action it is necessary to state correctly to whom the rent is due.

"Not guilty" puts in issue the tenancy and the ownership of the goods.

Semble, that it is improper to join with a cause of action of this nature a count for the seizure and conversion of the goods. *Robinson v. Shields*, 386.

12. *Seizure by Division court bailiff—Trespass against sheriff for subsequent seizure—Pleading—Evidence.*

A seizure of goods under a Division Court execution being entitled under sec. 266, Con. Stats. U. C. ch. 22, to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter from the seizure made by him, the goods being under the Division Court writ already in the custody of the law.

Held, that also, in the absence of a count in the declaration for money had and received, plaintiff could not recover for the surplus money which under sec. 251 the sheriff could have seized in the hands of the Division Court bailiff after satisfaction of the prior execution.

Semble, that in accordance with *White v. Morris*, 11 C. B. 1015, the mere production of the *fi. fa.* will not enable the sheriff to shew that a deed which is good against all but creditors is void against the latter, but that he must also prove the judgment on which the writ issued. *King v. Macdonald*, 397

13. *Action on award—Pleading*

The declaration, after reciting that certain differences had arisen between the plaintiff and the tes-

tator of the defendant, and that the said testator had entered into an arbitration bond with the plaintiff to submit to the award of certain parties therein named the matters in difference so existing between them, several of which were set out; and that the said parties having undertaken the said arbitration, had made and published their award in writing in the lifetime of the said testator should pay plaintiff by a certain day the sum of £100;—then averred that the said testator had not in his lifetime, nor had the defendant since his death, as his executrix, paid to plaintiff the said £100 so awarded to plaintiff, or any part thereof.

Held, on demurrer, declaration good; for the action appearing to be on the *award*, and not on the *bond to perform the award*, it was not necessary to set out the whole award, but only so much as would support the plaintiff's case.

From the declaration on bond conditioned to perform an award. *McCallum v. McKinnon*, 561.

14. *Return tickets, binding in terms—Conductor wearing badge of office on hat or cap.*

1st count of declaration alleged *payment by plaintiff to defendants of the legally authorized fare demanded by defendants* for plaintiff's passage from O. to T. and back again from T. to O., and the receipt by defendants thereof, that plaintiff having been carried to T. entered the train there to be transported back to O., of which defendant had notice, yet defendants, contrary to the statute, would not transport plaintiff to O., but ejected him from their cars.

2nd count.—Plaintiff, being a *passenger* on a train of cars of defendants running from T. to O.

was *by the servants of defendants* employed on said train forcibly and wrongfully put out of same before it reached O., though no one entitled on defendants behalf to demand or receive any fare or ticket had demanded same from plaintiff and though no servants of defendants on said train *wearing on his hat or cap any badge* to indicate his office, presented himself, to whom plaintiff could pay such fare or produce such ticket.

3rd count.—Plaintiff was by force and violence put out of cars by the conductor of defendants of a *pasengetrain* and servants or defendants, neither the former nor the latter wearing on his hat or cap any badge indicating his office.

2nd plea to 1st count.—That at the time when, &c., defendants were in the habit of issuing at a reduced rate to persons travelling between O. and T. who desired to return *within two days*, return tickets dated on the day of issue and marked, “good for day of date and following day only;” that on a passenger presenting such return tickets to the conductor the latter would take up half of the said ticket for the passage from O. to T., and the passenger retained the other half for the passage from T. to O.; that plaintiff bought from defendants such a return ticket marked (as above described); paying therefor the reduced rate, and did upon the same proceed to T. presenting to defendants' conductor said half of such return ticket for the passage from O. to T., that subsequently and *six days* after the date of said ticket plaintiff presented to the conductor on defendants' train going from T. to O. the said return ticket, and upon said conductor refusing to accept

same and requiring plaintiff to pay his fare to O., plaintiff refused to pay the lawful fare or any fare to defendants; whereupon said conductor put plaintiff out of the cars, &c.

2nd plea to 2nd count.—That at the time when, &c., defendants had a conductor in charge of said train, who was well known to plaintiff, *and who carried and wore a badge indicating his office*, and that said conductor stopped, &c., and plaintiff refused, &c., whereupon said conductor stopped, &c., and put plaintiff off, &c.

Held, on demurrer, 2nd and 3rd counts good: as to the 2nd, that although in the case of a trespass, where a forcible, wrongful and immediate act is charged, as in the present case, the usual and proper allegation is that the *defendants* did the act, or that *they* did it by their servants; yet that the servants of defendants possessing and exercising on behalf of defendants the power to remove plaintiff, the count sufficiently charged an act against defendants, which their servants in course of their employment might lawfully perform; that the allegation that plaintiff was a *passenger* shewed *prima facie* that he was lawfully there; that plaintiff was not obliged to shew that he had a ticket or was ready and willing, or offered to pay his fare, or that no fare was demanded, the action not being for a refusal to carry him, but for turning him off the train, to justify which *defendants* should shew a demand of the fare; and that plaintiff, complaining of a mere trespass, was not obliged to allege that a person wearing a badge and authorized by defendants, and known to plaintiff as being authorized, was present to receive the fare.

Held, also, 2nd plea to 1st count

good: that defendants were not obliged to deny that plaintiff legally paid his fare, for they could not properly have done so, *having admitted*, as they had, *the purchase by plaintiff from defendants* of a return ticket to and from T.; that defendants had shewn a good contract not inconsistent with their statutory duty; and that that contract being voluntary on the part of the plaintiff, and beneficial to him in his nature, it was not necessary that either the contract itself or its terms should have been embodied in a by-law in order to make it legal; that it was unnecessary to deny that defendants had charged more than 2d. per mile, as it did not appear that they had done so; that defendants could lawfully impose a condition of returning within a specified time, because it was a special and reasonable bargain, and optional with the plaintiff to enter into or not, and that therefore the ticket issued by defendants to plaintiff constituted a valid contract between them, *and was binding in its terms* upon plaintiff.

Held, also, 2nd plea to 2nd count bad, for not alleging that the conductor wore a badge "upon his hat or cap," *or* on some conspicuous part of his person or dress, *or* so as to be seen by passengers; and that 2nd plea to 3rd count, which was the same as 2nd plea to 2nd count, was *not* objectionable on this ground, for that the count not shewing any justifiable cause for plaintiff being in the train, defendants could no doubt put him out, and their officer was not, therefore, alleged to assume the badge for that purpose; but

Held, that neither plea shewed a sufficient justification for the act complained of without the allegation that plaintiff was *requested to*

leave the cars before he was forcibly ejected therefrom. *Farewell v. Grand Trunk Railway Company*, 427.

15. *Trespass — Justification — Nonsuit — Evidence — New assignment.*

The first count of the declaration alleged that defendant had wrongfully and injuriously cut away, removed and destroyed a bridge belonging to the plaintiffs.

The second count alleged a highway between two townships, intercepted by a river, over which plaintiffs, in performance of their duty had at large cost, built and maintained a bridge, which defendant, contriving to injure plaintiff had wrongfully cut down, destroyed, removed and carried away thereby obstructing said highway; whereby plaintiffs had become liable to rebuild and had rebuilt the same, at large cost to themselves.

Defendant pleaded to both counts, Not guilty, and a denial that the bridge was plaintiffs' property; and for the third plea, to both counts, a justification, alleging that the said river was and had always been a navigable stream at the place, &c., for conveyance of logs and timber; and defendant, with others, had been accustomed to use it for such purpose; that during certain freshets defendant was, with others, so engaged and was obliged to pass that part of the river crossed by the bridge which obstructed the navigation, and prevented the passage of defendant's timber; and whilst the bridge so obstructed the navigation, and though the defendant used due care and skill, said timber ran against the same, and unavoidably cut, broke and destroyed the same which were the

injuries and trespasses complained of.

On these pleas plaintiffs took issue.

Defendant in effect succeeded upon his plea of justification, the jury having found a verdict for plaintiffs for \$20, for the mere removal by defendant's servants of a pier and stone belonging to the bridge, on a day subsequently to the destruction of the bridge by the timber which had been justified.

Held, the defendant, having pleaded the general issue to the first and second counts, and a denial of plaintiffs' property in the bridge was not entitled to a nonsuit, as the issues on these pleas had been properly found for the plaintiffs.

Held, also, (A. Wilson, J., *dis-sentiente*,) that it was not necessary to *new-assign* the injury to the pier; for that there, being two counts in the declaration, and the injury in question not being part of one continuing trespass, but a distinct act done at another time after the destruction of the bridge, evidence thereof might be given under, and the verdict therefor sustained on, the second count of the declaration.

The evidence shewed that defendant's *servants* cut away a portion of the bridge on the first day that the timber collided with it, while the only cutting justified by the plea was that caused by the timber; *Quære*, whether the plea justified the whole trespass charged in the first count; for, if not,

Semble, that the verdict might be sustained on the count; but,

Quære, whether the first cutting away was so distinct an act of trespass as to have enabled plaintiffs to recover on that count, in the face of the finding of the jury as to the facts mentioned in the

special plea. *The Corporation of Thurlow v. Bogart*, 601.

See DIVISION COURTS, 2.

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POLICY OF INSURANCE.

Date and issue of—When insurance effected—Statement of insurable interest.

Plaintiff, in March, 1861, made a written application to defendants for insurance on certain premises. The risk was accepted conditionally, on certain alterations being made, until the making of which it was not to be considered as taken. After these alterations were made, no steps were taken towards completing the contract of insurance until January 1862, when a policy, dated in May 1861, was issued and delivered to the plaintiff. Among other conditions of the policy were these three: 1st, that the policy should not be binding on the company until *actual* payment of the premium; 2nd, that applications for insurance should specify the construction of the building to be insured, and that *after* the effecting of the insurance any increase to the risk by any means whatever within the control of the insured should avoid the policy; 3rd, that if the property to be insured were leasehold, or other interest not absolute, it should be represented to the company, and expressed *in the policy in writing*.

The premium was not paid in full till January, 1862, on the day of the issue and delivery of the policy to plaintiff.

Between March, 1861, and January, 1862, a funnel for conducting shavings from an upper to a lower story, in front of a furnace, was placed in the insured building: this addition or alteration, it was proved, increased the risk.

There was also a mortgage on the premises, which was mentioned in the *application* of insurance.

Held, 1st, that the insurance was not effected until January, 1862, and that the policy not having then a retroactive relation to its date for any other purpose than for the computation of the period at which it should expire, the risk by the erection of the funnel was not increased *after* but *before* the making of the policy; 2nd, that the third condition had been sufficiently complied with, inasmuch as the property was specified in the *application* as mortgaged property, and the application was by the terms of the policy a part of the latter, and therefore the mortgaged interest was represented to the company, and expressed *in the policy in writing*. *Fourdrinier v. Hartford Fire Insurance Company*, 403.

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POSSESSION.

Evidence of.]—See TRESPASS.

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POUNDAGE.

Sheriff—Poundage.

Held, that under Con. Stats. U. C. ch. 22, sec. 271, a sheriff is not entitled to poundage unless he *actually levies the money* due under the writ in his hands; notwithstanding that in consequence of the pressure exerted by seizure of his property the defendant has paid or otherwise settled the debt. *Buchanan et al. v. Frank*, 196.

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PRACTICE.

Defective application — Discharge—Renewal in Chambers—Practice.

The court discharged with costs a rule *nisi* to amend a judge's

order, because the pleadings, on which the rule purported to have been moved, were not in fact before the court, nor were they disclosed by the affidavit filed, and it was impossible rightly to decide the case without reference to them

Semble, that where an application, cognizable in chambers has been made to the court and discharged, but not on the merits, it may be afterwards rendered before a judge in chambers. *Crooks v. Dickson*, 528.

See ARTICLED CLERK—FI. FA., 3—CRIMINAL LAW, 3.

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PREFERENCE.

A chattel mortgage by and insolvent, executed under pressure by the creditor, e.g., a threat of a criminal prosecution, but given to secure a pre-existing debt, is not a fraudulent preference under Con. Stats. U. C. ch. 26, sec. 18.]—
See CHATTEL MORTGAGES.

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PRESSURE.

See CHATTEL MORTGAGES.

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PRINCIPAL AND AGENT.

Sale by latter out of ordinary course of dealing—Con. stats. C. ch. 59—Question for the jury.

Whether the plaintiff employed his brother W. as agent to conduct his business at T., which he himself left to carry on business at N. and the defendant purchased from W. certain goods, alleging that he had so purchased them out of the ordinary course of dealing with W. and agreed to sell to him and to allow him to credit half the price on an antecedent debt due by W. to him.

Held, that Con. Stats. C. ch. 59, did not apply to a case of this kind.

Held, also, that the jury should have been directed to find whether the plaintiff had permitted W. so to carry on the business as to allow him to make this special sale to the defendant. *McGuire v. Shaw* 310.

PRIORITY OF WRITS.

See FI. FA. 2—NEW TRIAL, 4.

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PRIVATE MEMORANDUM BOOK

Not accounting for proceeds of notes given as collateral security—Private mem. book—Entries relating to matters in dispute—Withholding from inspection.

A new trial will be granted where a party does not satisfactorily account for notes received by him collateral to the notes sued on, or for the proceeds of the notes collected by him.

If a party withhold from inspection a book containing entries relating to the matters in question in the cause, on the ground that it is *private*, it will be taken to contain evidence unfavorable to himself. *Lowell v. Todd et al.* 306.

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PROBATE.

See AMERICAN PROBATE.

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PUBLIC ROADS.

Purchase of public roads from Government by county council—Price and time of payment—By-law necessary—Con. Stats. U. C. ch. 54, sec. 226, C. ch. 28, sec. 76.

The county council of any municipality has power, under Con. Stats. U. C., ch. 54, sec. 226, to

contract with the government for the purchase, *at a price beyond* \$20,000, of any public works, roads, &c., in Upper Canada, and to issue debentures for the payment thereof *in twenty years, without a by-law being passed to authorize the same.*

Semble, that if it be thought *desirable* to pass such a by-law it need not be first submitted to the ratepayers for assent thereto.

Con. Stats. C. ch. 28, sec. 76, specially authorize the sale to any municipal council by the Government of the public roads lying *beyond* the limits of such municipality. *In the matter of O'Neil and the Corporation of the United Counties of York and Peel*, 249.

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QUALIFICATION OF JUSTICES OF THE PEACE.

See JUSTICES OF THE PEACE.

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QUARTER SESSIONS (APPEAL FROM).

Non-compliance with Con. Stats. U. C. ch. 113, secs. 9, and rules of court.

The court will not hear an appeal from the quarter sessions unless the provisions of the statute and rules of court prescribing the preliminary steps necessary to the hearing of such appeal have been strictly complied with. *The Queen v. Hatch et al.* 461.

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RAILWAYS AND RAILWAY COMPANIES.

Railway Company — Carriage of Goods—Special Conditions.

The plaintiffs delivered to the defendants, a railway company, for carriage, a quantity of oil, which the defendants accepted under certain conditions indorsed on a receipt given to the plaintiffs, pro-

viding that they would not be responsible for leakage, delay, or loss of market, &c.

Held, on the authority of *Hamilton v. G. T. R. Co.* 23 U. C. Q. B. 600, that such delivery and acceptance constituted a special contract, which exempted the defendants from all liability for loss sustained in consequence of the accidents provided against, though such accidents had been caused by the defendants' negligence. *Spétigue et al. v. Great Western Railway Company*, 315.

Conductor wearing badge of office on hat or cap — Return ticket binding in its terms.] — See PLEADING, 14.

—O—

REFERENCE TO MASTER.

Under con. Stats. C. ch. 22, sec. 161.] — See INTEREST, 3.

—O—

RENEWAL.

See FI. FA. 2.

Renewal in chamber of unsuccessful application to court.] — See PRACTICE.

—O—

RETURN TICKET.

Issued by railway companies binding in its terms.] — See PLEADING, 14.

—O—

RIVERS.

See LAKES AND NAVIGABLE RIVERS.

—O—

SALE

By individual members of an incorporated company of their personal interest in] — See PLEADING, 14.

See INSOLVENT—PRINCIPAL AND AGENT.

SCHOOL RATE.

See SCHOOL TRUSTEES.

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SCHOOL TRUSTEES.

Power to levy school rate at any time.

Under the acts relating to common schools, school trustees may at any time impose and levy a rate for school purposes; they are not bound to wait until a copy of the revised assessment roll for the particular year has been transmitted to the clerk of the municipality, but may and can only use the existing revised assessment roll. *The Chief Superintendent of Education in re Hogg v. Rogers*, 417.

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SCIRE FACIAS.

Sci. fa.—Bond to the Crown by and on behalf of deputy postmaster—*Con. Stats. C. ch. 31, subsec. 2 of sec. 64.*—Joint and several obligors—Propriety of procedure—Demurrer.

The defendant entered into a joint and several bond to the Queen with D. and S., for the faithful discharge by S. of the duties of deputy postmaster at O. On *sci. fa.* against defendant on the bond, he appeared, and, upon its being set out on oyer, demurred to it, on the grounds, first that a bond of this nature should, since the passage of the "Post Office Act," have been proceeded on by suit in the name of the *Postmaster General*, and not by *sci. fa.*, or at the instance of the *Attorney General*; secondly, that the proceedings should have been against the parties to the bond jointly, or it should appear while the other parties were not joined.

Held, that though the statute

may authorize the *Postmaster General* in such cases to sue in his official name, the words "or otherwise, contained therein do not deprive the crown of the right to *sci. fa.* on a bond taken expressly in the name of the Queen.

Held, also, that the Crown may have *sci. fa.* against one or against all of the joint and several obligors of a bond, but that the proceeding must be against all or each one. *The Queen v. Macpherson*, 17.

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SEARCH.

Sufficiency of to admit secondary evidence of the lost deed.]—See MEMORIAL.

—o—

SECONDARY EVIDENCE.

See FI. FA, 3.

As to lost deeds.]—See MEMORIAL.

—o—

SEIZURE.

No cessation of on expiration of fi. fa. lands before intended day of sale which has been regularly advertised.]—See FI. FA. 1.

—o—

SEPARABLE AWARD.

See ARBITRATION AND AWARD.

—o—

SEPARATE COUNTS.

Verdict against two defendants on.]—See MAGISTRATE.

—o—

SHERIFF.

Trespass will not lie against for a seizure made by him subsequently to a seizure a division court execution.]—See PLEADING, 12.

See POUNDAGE.

STATUTES.

13 Eliz. ch. 5, sec. 2.]—See Insolvent.

29 Car. II. ch. 3.]—See Will—Part Performance.

2 W. & M. ch. 5, sec. 5.]—See Pleading, 11.

9 Geo. IV. ch. 31.]—See Aliens. Con. Stats. U. C. ch. 19.]—See Division Courts, 2.

Ch. 21, sec. 161.]—See Interest, 3.

Ch. 22, sec. 222.]—See Adding Parties at Trial.

Ch. 22, sec. 266.]—See Pleading, 12.

Ch. 22, sec. 271.]—See Poundage.

Ch. 26, sec. 18.]—See Insolvent—Chattel Mortgages.

Ch. 32, sec. 21.]—See Commission to take evidence, 1.

Ch. 45, secs. 1, 2.]—See Chat-
tel Mortgages.

Ch. 48.]—See Pleading, 1.

Ch. 54, sec. 226.]—See Public Roads.

Ch. 73.]—See Administration

Ch. 74, sec. 5.]—See Adding Parties at Trial.

Ch. 82, sec. 13.]—See Will.

Ch. 88, secs. 1, 3.]—See Limitations (Statute of).

Ch. 113, sec. 9.]—See Quarter Sessions.

Ch. 124, secs. 1, 2.]—See Pleading, 10.

Con. Stats. ch. 8, sec. 9.]—See Aliens.

Ch. 28, sec. 76.]—See Public Roads.

Ch. 31, subsec. 2 of sec. 64.]—See Scire Facias.

Ch. 59.]—See Principal and Agent.

Ch. 94, sec. 13.]—See Criminal Law, 1.

Ch. 100, sec. 3.]—See Justice of the Peace.

26 Vic. ch. 45, secs. 2, 3.]—See Assignment.

27 & 28 Vic. ch. 4.]—See Pleading, 5.

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TENANT OF EXECUTOR OF DEBTOR.

Cannot, after judgment by default against his landlord, as executor, deny that latter was executor.]—See Evidence, 1.

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TENDER OF DEED FOR EXECUTION.

When not necessary by obligee of bond for deed.]—See OBLIGOR (OF BOND TO CONVEY ON A DAY CERTAIN).

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TITLE BY ESTOPPEL.

Action for breach of covenant for title—Title by estoppel—Nominal damages.

In an action for breach of absolute covenant for title to land, *Held*, that the plaintiff (the vendee) was not entitled, without proof of special damage, to recover more than nominal damages where the defendant (the vendor) had subsequently, and even *not until after action brought*, acquired the outstanding title; for by the doctrine of estoppel, as laid down in *Doe Irvine v. Webster*, 2 U. C. Q. B. 224, a perfect title to the land passed to the plaintiff through the defendant's former conveyance to him immediately upon the outstanding title becoming vested in the defendant, the bare title by estoppel which the plaintiff before alone had being thus fed by the after-acquired interest which re-

flected instantly back upon the former, and perfected the plaintiff's title to the land. *Boulter v. Hamilton*, 125.

See INFANT.

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TITLE TO LAND.

Though involved in the enquiry, does not prevent judge of division court from entertaining interpleader application to try the question of property in goods.]—See DIVISION COURT, I.

—o—

TORT (JOINT).

See MAGISTRATE.

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TRADE FIXTURES.

Mortgage—Intention as to subject matter of—Trade fixtures.

B. Mortgaged to the plaintiffs certain premises, *together with the water wheel and flumes*, outhouses, buildings, ways, waters, water-courses, privileges and appurtenances to the said premises belonging; and afterwards mortgaged to H. the same premises describing them as the "woollen works, and also all the fire engine, boiler, machinery and fixtures, and the water wheel, and all fixed machinery, and shafting and fixtures of every kind about the same." Subsequently to these mortgages B. conveyed to M. his equity of redemption in the said premises, also describing them as the Dundas Woollen Works, * * * together with all the machinery in and about the same then owned by G. B. H. assigned his mortgage to K. B. Subsequently to the mortgage to the plaintiffs, B. & M. placed on the premises certain loom spinning machines, warping mills, and various other articles of

the same kind, which were secured by nails and screws to the floors, and by braces secured by screws and bolts to the ceilings, but could be easily removed without injury either to the premises or to themselves. B. having made default in certain payments due under his mortgage, a decree of foreclosure was obtained in the ordinary course from the Court of Chancery against M., in whom the equitable title was vested by conveyance from B., and a day was appointed for him to redeem or be foreclosed. In the meantime, however, M. and K. B. sold the machinery last mentioned to the defendant, who removed it from the premises. In an action by the plaintiffs against the defendant for the conversion of the machinery in question, and on a motion to set aside the verdict obtained by the defendant,

Held, that the terms of the mortgage to the plaintiffs did not indicate an intention that the plaintiffs should have a claim upon any portion of the machinery in the premises except that only which related to the motive power of the mill.

Semble, that the mortgage to H. covered the machinery in question in the suit; that had the machinery at the time of the conveyance by B. to M. been the property of B. as chattels, it would without doubt have passed to M., and that though the machinery might for many purposes have been looked upon as fixtures, yet as between the plaintiffs as mortgagees and B., and all persons claiming under him, it was not so annexed to the freehold as to be irremovable by the latter.

Quære, as to the general right of a mortgagor to remove from the mortgaged premises machinery of

the kind annexed in such a way to the freehold.

General review of the authorities both in England and this country on the subject of fixtures, since *Carscallen v. Moodie*, 15 U. C. Q. B. 304. *The Great Western Railway Co. v. Bain*, 207.

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TRESPASS.

Trespass to land—Evidence of possession.

Where the only evidence of possession was the entry by plaintiff upon, and his presence at the survey of, the land, the trespass to which had been previously committed and was the cause of action claiming it as his own, but shewing no title, the defendant also assisting in the survey and not objecting to plaintiff's right of possession though asserting his own right to have committed the trespass complained of,

Held, that there was no evidence of either active or constructive possession in plaintiff to entitle him to maintain trespass; but that had he shewn any title to the land, this would have given him a constructive possession. *Greaves v. Hilliard*, 326.

See PLEADING, 2, 12, 15—MAGISTRATE.

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TROVER.

Trover—Excessive Damages.

Defendants undertook to carry for plaintiffs a quantity of oats to T., which they did, delivering them at an elevator there belonging to S., who received them to hold for plaintiffs. Of the quantity thus delivered plaintiffs received part before the elevator was destroyed by fire, as it subsequently was. There was a very large

amount of grain besides the plaintiffs' in the elevator at the time of its destruction, most of which settled down in a conical mass on the wharf on which the building stood the remainder falling into the water. Plaintiffs desired to remove that remained of their grain, alleging what they could select it from the general mass, from their knowledge of the portion of the building in which it had been stored; but the defendants, who were the bailees of the greater part, assumed charge of the whole for the benefit of all, and refused to allow plaintiffs to do so, stating that it would be sold for the general benefit, which it accordingly was, when the plaintiffs' share of the proceeds of the sale was found to amount to only about \$28.

Held, that plaintiff could maintain trover against defendants in respect of their grain so disposed of by defendants, inasmuch as the latter had no control over it, and ought not to have prevented plaintiffs from removing it if they could find it.

Held, also, that this was a case in which no greater than the actual damages sustained should have been assessed; and, the jury having awarded excessive damages, the court made such an order as would secure as far as possible the necessary relief in that respect. *Moffat et. al. v. The Grand Trunk Railway Company*, 392.

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UNSTAMPED BILLS OF EXCHANGE AND PROMISSORY NOTES.

Time for affixing double stamp.
—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

Defence of absence of stamp not open where the fact is not

pleaded, nor making of note denied.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

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VALUATION.

Of improvements by tenant, where mode of valuation not provided for by lease.]—See LANDLORD AND TENANT, 1.

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VARIANCE.

Between the contract set out in the declaration and that proved is immaterial, in an action by tenant against landlord for wrongful distress.]—see PLEADING, 11.

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VERDICT.

A general verdict, on a declaration containing one count in trespass and another on case, is not bad in law—Restricting verdict to one count.]—See MAGISTRATE.

Amount of verdict to govern on taxation, in absence of certificate for full costs.]—See COSTS.

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WAIVER.

See IRREGULARITY.

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WARRANT (OF MAGISTRATE).

Only prima facie evidence of its contents.]—See MAGISTRATE.

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WILLS.

Attestation—statute of Fraud—Con. stats. U. C. ch. 82, secs. 13—Evidence.

Con. Stats. U. C. ch. 82, sec. 13. does not repeal, but merely extends

the Statute of Frauds as to the execution of wills; and a will subscribed by the witnesses, in accordance with the provisions of either act, is sufficiently attested.

Held, therefore, in this case, that a will subscribed by two witnesses, in the presence of of the testator, though not in the presence of each other, was well executed.

Held, also that although there was no positive evidence that one of the witnesses had in fact subscribed in the presence of the circumstances attending the execution of the will, and the fact of possession having for upwards of sixteen years gone along with it, coupled with proof of the death of the witness would warrant a jury in finding, and the court, under the power given it to draw inferences of fact, in inferring, that the witness had signed in the presence of the devisor; and that the will was therefore duly executed.—Crawford v. Curragh et al., 55.

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WITNESS.

Competency of partner, when not a party to record.]—see PARTNERSHIP.

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WORDS) CONSTRUCTION OF

“Month,”]—See LANDLORD AND TENANT, 1.

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WRONGFUL DISTRESS.

In an action by tenant against landlord for a wrongful distress and sale of his goods, the gist of the act is the wrong complained of.]—see PLEADING, 11.



